Office Supreme Court, U.S.
FILED
AUG 24 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term 1964

No. 428

ALBERT LAPIN and LAPINAL, INC.,

Petitioners,

vs.

SHULTON, INC., and TECNIQUE, INC.,

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

FRANCIS GEORGE STAPLETON
10517 Santa Monica Blvd.,
Los Angeles, Calif. 90025,
Attorney for Petitioners.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

SUBJECT INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	3
Statute involved	4
Statement of the case	4
Reasons for granting the writ	11
Conclusion	34

INDEX TO APPENDICES

	Page
Appendix A. Opinion of the United States Court of Appeals for the Ninth Circuit	App. p. 1
Appendix B. Order granting defendants' motion to dismiss	9
Appendix C. Memorandum and order	12
Appendix D. Rule 60. Relief from judgment or order	18

TABLE OF AUTHORITIES CITED

Cases	Page
Atchison, Topeka & Santa Fe Rwy. v. Wells, 265 U. S. 101	21
Butler v. Ungerleider, 187 F. 2d 238	18
Byrd v. Blue Ridge Rural Electric Cooperative, 356 U. S. 525	33
Fireman's Fund Ins. Co. v. Railway Express Agency, 253 F. 2d 780	33
General Ind. Co. v. Birmingham Sound Reproducers, Ltd., 26 F. R. D. 559	34
Hadden v. Rumsey Products, 196 F. 2d 92, 96 F. Supp. 988	14, 15
Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U. S. 238	16
Land v. Dollar, 330 U. S. 731	33
Magenau v. Aetna Freight Lines, 360 U. S. 273	33
Markert v. Swift & Co., Inc., 173 F. 2d 517	35
Marks Food Corp. v. Barbara Ann Baking Co., 274 F. 2d 934	33
Marshall v. Holmes, 141 U. S. 589	20
McNeil v. McNeil, 78 Fed. 834	20
River Plate Corp. v. Forestal Land, Timber & Railway Co., Ltd., 185 F. Supp. 832	34
Sayers v. Burkhardt, 85 Fed. 246	16
Shaffer v. Coty, Inc., 183 F. Supp. 662	33
Simon v. Southern Railway, 236 U. S. 115	20
Smithers v. Smith, 204 U. S. 632	33

Page

Taylor v. Hubbell, 188 F. 2d 106, Cert. denied, 342 U. S. 818 33

Wells Fargo & Co. v. Taylor, 254 U. S. 175 20

Williams v. Minnesota Mining & Manufacturing Co., 14 F. R. D. 1 33

Ziegler Chemical & Mineral Corp. v. Standard Oil of Calif., 32 F. R. D. 241 34

Rules

Federal Rules Decision, Secs. 433, 478 14

Federal Rules Decision, Rule 5, pp. 433, 434 ....12, 14

Federal Rules of Civil Procedure, Rule 59 ....9, 13, 22

Federal Rules of Civil Procedure, Rule 59(a)(2) 22

Federal Rules of Civil Procedure, Rule 60 12

Federal Rules of Civil Procedure, Rule 60(b) ..2, 4, 10 ..... 11, 12, 14, 16, 20, 34

Federal Rules of Civil Procedure, Rule 60(b)(5) 3, 4 17

Statutes

Securities & Exchange Act of 1934, Sec. 15(d) 26

Securities & Exchange Act of 1934, Rule X-15D-1 .. 26

United States Constitution, Title 28, Sec. 1254(1) .. 2

Textbook

Moore and Rogers, Federal Relief from Civil Judgments, 55 Yale Law Journal, pp. 623, 638 ...19, 20

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ALBERT LAPIN and LAPINAL, INC.,

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vs.

SHULTON, INC., and TECNIQUE, INC.,

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Lapinal, Inc., a corporation, and Albert Lapin, individually and as an officer of said corporation, pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled cause on May 27, 1964.

Opinions Below.

The opinion of the United States Court of Appeals for the Ninth Circuit is not yet reported but is reproduced in Appendix A, pp. 1-8. The Order of the United States District Court for the Southern District of California, Central Division, granting Defendants' Motion to Dismiss, entered December 4, 1962, is not reported but is reproduced in Appendix B.

The Memorandum and Order of the United States District Court for the Southern District of California,

Central Division, entered April 29, 1963, clarifying and amending its Order of December 4, 1962, is not reported but is reproduced in Appendix C.

Jurisdiction.

The Judgment of the United States Court of Appeals for the Ninth Circuit was entered on May 27, 1964. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

Questions Presented.

1. Does the United States District Court for the Southern District of California have jurisdiction to entertain an independent action brought by plaintiffs in 1962 seeking relief from an injunction issued in 1951 by the United States District Court for the District of Minnesota where the relief sought is predicated on Rule 60(b), Federal Rules of Civil Procedure, in that it is no longer equitable that the judgment should have prospective application and where, in 1962, the principal defendant, Shulton, Inc. (who was not a party to the original action nor an assignee of record of one of the parties to the original action), did not do business nor could it be found in the territorial jurisdiction of the issuing court?

2. Does Rule 60(b) merely preserve to the Courts the powers which theretofore they had been free to exercise under writs of *coram nobis*, *coram vobis*, *audita querela*, bills of review and bills in the nature of bills of review, or otherwise, or does Rule 60(b), as its

language so plainly indicates, abolish the substance and procedure of the old ancillary writs and substitute therefor a motion, as prescribed in the rules or an independent action as alternative procedures for obtaining any relief from a judgment?

3. Do considerations of comity and orderly administration of justice demand that, in an independent action brought under Rule 60(b)(5), the non-rendering Court should decline jurisdiction of such an action and remand the parties for their relief to the rendering Court where at the time of the commencement of the independent action (approximately eleven years after the original injunction was issued) the principal defendant, Shulton, Inc. (who was neither a party to the original action nor an assignee of record of one of the parties to the original action), did not do business nor could it be found in the territorial jurisdiction of the issuing court?

4. In an action brought under Rule 60(b)(5), was the District Court correct in granting defendants' motion to dismiss, made after both defendants had appeared in the action and had filed a joint answer, on the ground that defendant Tecnique, Inc., was an indispensable party not properly served where defendant had answered only 40 out of 124 interrogatories served by plaintiffs; where plaintiffs were denied any discovery on the issues raised by the motion to dismiss, which issues were substantive issues in the case as well as jurisdictional issues and where there was no plenary trial of such issues?

Statute Involved.

There is no specific statutes involved. This case involves the interpretation of Rule 60(b) and particularly Rule 60(b)(5) of the Federal Rules of Civil Procedure, and is reproduced in Appendix D.

Statement of the Case.

On or about November 22, 1947, Albert Lapin, Isadore Lapin, Samuel Lapin and Harold Lapin, predecessors and organizers of plaintiff Lapinal, Inc., entered into a written license agreement with La Maur Products, Inc., a Minnesota corporation, under the terms of which the Lapins granted La Maur an exclusive license to manufacture and sell a hair dye made in accordance with a "secret" formula and "secret" process and La Maur Products, Inc., agreed to make an initial cash payment and to pay royalties. After difficulties arose between the parties, the Lapins commenced an action (Civil Action, File No. 3232) on January 30, 1950, in the United States District Court for the District of Minnesota, Fourth Division, for an injunction and damages and La Maur, Inc., as defendant in that action, filed an answer and a counterclaim seeking an injunction against manufacture of the said hair dye by the Lapins and certain damages.

On or about September 18, 1950, the said action was brought to trial before Judge Nordbye and resulted in the granting of an injunction on December 30, 1950, in favor of La Maur, Inc., the essence of which is as follows:

> "Now, therefore, pursuant thereto, you, Albert Lapin, Isadore Lapin, Samuel Lapin and Harold Lapin, and each of you, your agents, servants, em-

ployees and attorneys, and all persons in active concert or participation with you, including Lapinol, Inc., a California corporation, and its successors or assigns, hereby are jointly and severally commanded forthwith to cease and desist from, and are enjoined and prohibited from directly or indirectly further manufacturing, producing, compounding, making, preparing, selling, delivering, disposing of, or distributing 'Lapinol' hair-dye or any other hair-dye made by or in accordance with or covered by the formula and or formulas and process which is the subject matter of the License Agreement of November 22, 1947, between Albert Lapin, Isadore Lapin, Samuel Lapin and Harold Lapin as parties of the first part, and La Maur, Inc., as party of the second part, or any improvement therein or thereof, including the use of any ingredient added by defendant, La Maur, Inc., on or about and since February 13, 1948; and from, directly or indirectly, licensing, causing, consenting to, or assisting or cooperating in, the same by any person, party, firm or corporation other than said defendant; and are further enjoined and prohibited from, directly or indirectly, disclosing or causing to be disclosed, said formula and or formulas or process or any improvement therein to any person, party, firm or corporation other than said defendant, so long as the said License Agreement remains in force and effect." [R. p. 3, line 25, to p. 4, line 20.]

Subsequently, on or about July 5, 1951, Judge Nordbye, pursuant to a stipulation of the parties, entered an amendment and modification of Findings of Fact,

Conclusions of Law and Order and Decree granting an amended writ of injunction as follows:

"Now, therefore, pursuant thereto you, Albert Lapin, Isadore Lapin, Samuel Lapin and Harold Lapin, and each of you, and your agents, servants, employees and attorneys, and all persons in active concert or participation with you or them, including Lapinol, Inc., a California corporation, also known as LapinAl, and its successors and assigns, hereby are, jointly and severally, enjoined and prohibited from selling, transfering, assigning, divulging or disposing in any manner whatsoever, directly or indirectly, to any other person, firm or corporation, including any and all persons other than you Albert Lapin, Isadore Lapin, Samuel Lapin and Harold Lapin yourselves, who now or hereafter are or may become interested in said LAPINOL, INC. or its successors or assigns, whether as investors, money-lenders, agents, employees or otherwise, the formula or formulas or process for the manufacture of 'LAPINOL' hair dye, also known as 'LapinAL', or any other hair dye, or hair coloring or hair tinting products or process now known to or hereafter devised by you or any of you, made by or in accordance with or covered by the formulas and process which are the subject matter of the License Agreement of November 22, 1947 between you as parties of the first part and La Maur, Inc. as party of the second part (of which Exhibit 'A' attached to the Complaint in this case is a copy), or any improvements therein or thereof, or any interest or right in any of the foregoing; and are further, jointly and severally, en-

joined and prohibited from licensing, authorizing, causing, consenting to, assisting or suffering, directly or indirectly, any person, firm or corporation, to manufacture, produce, compound or sell, or distribute 'LAPINOL' hair dye, also known as 'LapinAL', or any other hair dye or hair coloring or hair tinting products or process now known to or hereafter devised by you or any of you, made by or in accordance with or covered by the formulas and process which are the subject matter of said License Agreement, or any improvements therein; and are further, jointly and severally, enjoined and prohibited from divulging or disclosing or causing to be divulged or disclosed, directly or indirectly, to any person, firm or corporation whatsoever the secret formula or process for the manufacture of 'Tecnique', or any changes or improvements therein made or to be made by defendant La Maur, Inc., but are jointly and severally commanded and enjoined to keep the same forever in strict confidence and secrecy.' Provided, however, that the foregoing restraint, prohibition and command shall not be construed to prevent you, Albert Lapin, individually or through the instrumentality of said LAPINOL, INC. from manufacturing 'LAPINOL' or 'LapinAL', or any other hair dye or hair coloring or hair tinting product other than 'TECNIQUE', or from selling the same in the usual course of the beauty trade for so long, but only so long, as you, Albert Lapin, Isadore Lapin, Samuel Lapin and Harold Lapin, and each of you, and your agents, servants, employees and attorneys, and all persons in active concert or participation

with you or them and said LAPINOL, INC. shall refrain from violating the foregoing injunctions, prohibitions and commands, and for so long, but only so long, as said LAPINOL, INC. shall remain a corporation with the majority of each class of shares of stock or other securities issued by it owned and held by you, Albert Lapin, to your own account, free and clear of any encumbrances, restrictions and agreements, and you, Albert Lapin, continue as its principal officer; and on the additional condition that you, Albert Lapin, and/or said LAPINOL, INC., shall not adopt or use the name 'TECNIQUE' or any name resembling or similar to the word 'TECNIQUE', or resembling or similar to any other name or mark used by defendant LA MAUR, INC." [R. p. 4, line 26, to p. 6, line 29].

La Maur, Inc., thereafter manufactured and sold a hair coloring substance under the trade name "Tecnique" through the instrumentality of a Minnesota corporation named Tecnique, Inc., until August, 1959, when all of the stock of Tecnique, Inc., of Minnesota, was sold to Shulton, Inc. [R. p. 165, lines 11-17; pp. 243, 244.] Concurrently, Shulton organized a New Jersey corporation which also bore the name Tecnique, Inc. Five months later, in December, 1959, Tecnique, Inc., of Minnesota, then wholly owned by Shulton, transferred to Tecnique, Inc., of New Jersey, also wholly owned by Shulton, its interest in the basic formula by a bill of sale [R. p. 192] and its interest, if any, in the decree of injunction by an assignement. [R. p. 198.] Both Tecnique, Inc., of New Jersey, and Shulton, Inc., have thereafter engaged in the manu-

facture and distribution of a hair coloring substance called Tecnique. Since 1951, petitioner Lapinal, Inc., has manufactured and distributed a hair coloring substance called "Lapinal."

In July, 1962, Petitioners brought this action in the United States District Court for the Southern District of California, Central Division, under Rule 60(b)(5), Federal Rules of Civil Procedure, alleging that changed conditions arising since the issuance of the injunction of 1951 have made the prospective application of the injunction inequitable and oppressive to Petitioners and of no legitimate value to the defendant Shulton, Inc., and Tecnique, Inc. Both Shulton, Inc., and Tecnique, Inc., were served by serving the General Manager of Shulton, Inc., in Los Angeles.

The joint Answer (filed August 20, 1962) of defendants Shulton, Inc., and Tecnique, Inc., so far as relevant here, challenged the Court's jurisdiction to hear the case on the ground that the case could be heard only by the United States District Court in Minnesota [Answer, para. 2, R. p. 8] and on the further ground that Tecnique, Inc., of New Jersey, was an indispensable party which had not been properly served. The defendants thereafter (on November 14, 1962) made a motion to dismiss which was granted on December 4, 1962, by the District Court [R. pp. 225-227]. In its opinion the District Court held only that Tecnique, Inc., of New Jersey, was an indispensable party which had not been properly served but it did express an opinion, without so holding, that the relief sought by petitioners should only be sought by motion in the District Court where the original decree was issued. Thereupon petitioners moved, under Rule 59, (1) for a rehearing on

defendants' motion to dismiss; (2) to open the judgment to take additional evidence; (3) for a plenary trial upon the jurisdictional issues raised by the defendant's motion to dismiss and (4) to alter or amend the judgment thereafter entered. [R. p. 234.] On April 29, 1963, the District Court amended its order of December 4, 1962, to read that "defendants' motion to dismiss the complaint is granted without prejudice to the bringing of another action *when and if* it appears that the court can obtain jurisdiction of the defendant Tecnique, Inc." (App. C, p. 17). The District Court also stated that "If such a time should arrive, that would be time enough to decide whether an action such as the present one is properly maintainable in some court other than the one which rendered the decree of injunction." (App. C. p. 17.) Thereafter an appeal was taken to the Court of Appeals for the Ninth Circuit.

The United States Court of Appeals for the Ninth Circuit did not "reach" the issues upon which the District Court predicated its decision. (App. A. p. 2.) It merely decided that the action should have been brought in the issuing Court; the District Court of Minnesota, upon the following line of reasoning:

> (1) Rule 60(b) preserves to the courts the powers which theretofore they had been free to exercise under writs of *coram nobis, coram vobis audita querela* and bills of review and bills in the nature of bills of review or otherwise but does not grant new power and authority not theretofore recognized. (App. A. p. 4.)
>
> (2) Under the pre-existing powers thus preserved to the courts, there was no authority to

entertain an original action such as the one before the Court. (App. A, p. 4.)

(3) Considerations of comity and orderly administration of justice demand that the non-rendering Court should decline jurisdiction of such an action and remand the parties for their relief to the rendering court, so long as it is apparent that a remedy is available there. (App. A, p. 7.)

Reasons for Granting the Writ.

There are four principal reasons why this Court should grant a Writ of Certiorari.

1. The petition brings before the Court an important question of Federal procedure which has not been, but should be, settled by this Court. The United States Court of Appeals for the Ninth Circuit has, in its decision, adopted reasoning which, ignoring the plain language and expressed intention of the Advisory Committee, has rigorously restricted the humane purpose of Rule 60(b) and has infused into the clear language of the rule the subtleties and confusion of the old common law writs and equitable remedies. Since every action, whether legal or equitable in nature, brought in any Federal Court is potentially affected by Rule 60(b), there are firm considerations of public interest in an unequivocal judicial declaration of the intent, purpose and effect of Rule 60(b).

The decision of the United States Court of Appeals for the Ninth Circuit was predicated upon its conclusion that Rule 60(b) preserved to courts the powers which theretofore they had been free to exercise under certain specified common law writs but did not grant any new power or authority not theretofore recognized.

Then, in support of its conclusion that it found no authority for an original action such as the one in this case, it proceeded to discuss and analyze writs of *audita querela* and bills of review. Such reasoning is diametrically opposed to that of the Advisory Committee's Report, dated June 14, 1946, to the Honorable Justices of this Court.

In its transmittal letter to the Court, the Committee stated that "The time has arrived when the Court should consider amendments which experience may have shown to be desirable," and that "The purpose and effect of the amendments are stated in the notes."[1] Turning to the section of the Report which deals with Rule 60, we find that the amendments suggested by the Advisory Committee were adopted in *haec verba* except as to the reference to one statute.

The note of the Advisory Committee to Rule 60(b) is particularly enlightening. After discussing various decisions to the effect that the old common law remedies to obtain relief from a judgment were still available, the Committee stated that the rules should be complete and should define the practice with respect to any existing rights or remedies to obtain relief from final judgments. Then follows a clear statement of the purpose of the reconstruction of Rule 60(b).

> "The reconstruction of Rule 60(b) has for one of its purposes a clarification of this situation. Two types of procedure to obtain relief from judgments are specified in the rules as it is proposed to amend them. One procedure is by motion in

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[1]Report of the Advisory Committee, 5 F.R.D. 433, 434.

the court and in the action in which the judgment was rendered. The other procedure is by a new or independent action to obtain relief from a judgment, which action may or may not be begun in the court which rendered the judgment. Various rules, such as the one dealing with a motion for new trial and for amendment of judgments, Rule 59, one for amended findings, Rule 52, and one for judgment notwithstanding the verdict, Rule 50(b), and including the provisions of Rule 60(b) as amended, prescribe the various types of cases in which the practice by motion is permitted. In each case there is a limit upon the time within which resort to a motion is permitted, and this time limit may not be enlarged under Rule 6(b). If the right to make a motion is lost by the expiration of the time limits fixed in these rules, the only other procedural remedy is by a new or independent action to set aside a judgment upon those principles which have heretofore been applied in such an action. Where the independent action is resorted to, the limitations of time are those of laches or statutes of limitations. The Committee has endeavored to ascertain all the remedies and types of relief heretofore available by *coram nobis*, *coram vobis*, *audita querela*, bill of review, or bill in the nature of a bill of review. See Moore and Rogers, Federal Relief from Civil Judgments, 1946, 55 Yale L. J. 623, 659-682. It endeavored then to amend the rules to permit, either by motion or by independent action, the granting of various kinds of relief from judgments which were permitted

in the federal courts prior to the adoption of these rules, and the amendment concludes with a provision abolishing the use of bills of review and the other common law writs referred to, and requiring the practice to be by motion or by independent action."[2]

There can therefore be no doubt that it was the intention of the Advisory Committee in drafting Rule 60(b) that an independent action, such as the original action in this case, was preserved whether or not begun in the court which rendered the judgment. The Court of Appeals for the Ninth Circuit ignores not only the plain language of the Rule but also the statement of purpose of the draftsmen of the Rule and presumably the purpose and intent of the Court which promulgated the Rule. For that reason, we respectfully suggest that the decision incorrectly interprets the Rule and should be reversed.

2. There is a clear conflict between the decision of the Court of Appeals for the Ninth Circuit in this case and the decision of the Court of Appeals for the Second Circuit in *Hadden v. Rumsey Products*, 196 F. 2d 92 (2d Cir., 1952) reversing the decision of the District Court reported in 96 F. Supp. 988 (S. D. N. Y. 1951) and remanding the case for further proceedings.

In the Hadden case, the defendants executed cognovit notes payable to the corporation of which the plaintiff was the disinterested trustee. The notes contained a provision that any attorney could confess judgment in the event of a default and that the right of appeal

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[2]Report of the Advisory Committee, 5 F.R.D. 433, 478.

was waived. Plaintiff's attorneys, pursuant to the provision, filed an answer on behalf of the defendant consenting to the entry of the judgment requested in the plaintiff's petition, filed by the same attorneys in the Ohio District Court. Thereafter, plaintiff forwarded an exemplified copy of the confessed judgment for registration in the New York District Court and the defendant, upon learning of this action, immediately filed a petition for an order to show cause pursuant to which the New York District Court on the return date, "(1) granted a preliminary injunction against causing execution to be issued on the judgment; (2) restrained the Clerk of the New York Court from entering the transcript of the Ohio judgment; and (3) ordered that the matter remain open for further orders."[3] Subsequently, the defendants filed a second petition alleging the defenses to the notes and in which they sought an order to set aside the Ohio judgment. After a second hearing, the New York Court rendered a judgment which permanently enjoined the judgment creditor from attempting to enforce the Ohio judgment and permanently restrained the Clerk of the New York Court from entering the transcript of the said judgment in his office.

The plaintiff raised two questions on appeal:

(1) Whether the New York Court had acquired personal jurisdiction of the judgment creditor; and

(2) Whether the judgment by confession was obtained by a fraud on the Ohio court.

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[3] *Hadden v. Rumsey Products, supra*, at page 95.

The Court of Appeals for the Second Circuit held that by seeking affirmative relief from the New York District Court, the plaintiff had waived any question of personal jurisdiction. It further decided that the several petitions filed by the defendants could be treated as an independent action and that Rule 60(b) did not "limit the power of a court to entertain an independent action to relieve a party from a judgment" (*Ibid*, p. 95). The Court of Appeals reversed the judgment on the ground that there had been no fraud on the Ohio court and remanded the matter to the New York Court for a trial on the defendants' allegations of duress, fraudulent misrepresentation and concealment.

The decision of the Ninth Circuit also conflicts with the decision of the Fourth Circuit in *Sayers v. Burkhardt*, 85 Fed. 246, 248 (4th Cir., 1898) and of the decision of this Court in *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238 (1944) in which this Court stated at pages 244 and 248:

> "From the beginning there has existed * * * a rule of equity to the effect that under certain circumstances, one of which is after-discovered fraud, relief will be granted against judgments * * *. Marine Insurance Co. v. Hodgson, 7 Cranch 332, 3 L.Ed. 362; Marshall v. Holmes, 141 U.S. 589, 12 S.Ct. 62, 35 L.Ed. 870. * * * Out of deference to the deep rooted policy in favor of the response of judgments * * *, courts of equity have been cautious in exercising their power over such judgments. United States v. Throckmorton, 98 U.S. 61, 25 L.Ed. 93. *But where the occasion has demanded, where enforcement of the judgment is 'manifestly unconscionable,' Pickford v. Talbott,*

225 U.S. 651, 657, 32 S.Ct. 687, 689, 56 L.Ed. 1240, they have wielded the power without hesitation. Litigants who have sought to invoke this equity power customarily have done so * * * by original proceedings to enjoin enforcement of a judgment. *And in cases where courts have exercised the power the relief granted has taken several forms: setting aside the judgment to permit a new trial, altering the terms of the judgment, or restraining the beneficiaries of the judgment from taking any benefit whatever from it. But whatever form the relief has taken in particular cases, the net result in every case has been the same: where the situation has required the court has, in some manner, devitalized the judgment. * * *"* (Emphasis added.)

3. With regard to the specific case before this Court, the petitioners have been denied, as a purely procedural matter and without a trial on the merits, an opportunity to seek relief under Rule 60(b)(5) from an injunction in the only United States District Court where all of the interested parties can be found.

The Court of Appeals was in error in its determination, by inference at least, that the remand to the rendering court was proper "so long as it is apparent that a remedy is available there". (App. A. p. 7) Even if this principle were sound as a general pronouncement, it certainly is not sound as applied to the facts of this case. As we have seen (*supra*, p. 8), Shulton, Inc., the principal defendant acquired all of the stock of Tecnique, Inc., of Minnesota, on the same day [R. p. 165, lines 11-17] as it organized Tecnique,

Inc., of New Jersey. [August 19, 1959, R. p. 164, lines 11-13.]

On December 17, 1959, La Maur, Inc., executed a Bill of Sale to Tecnique, Inc., of Minnesota, and an assignment of its right, title and interest in the judgment and decree to Tecnique of Minnesota, and on December 18, 1959, with documents substantially identical in context, Tecnique, of Minnesota, executed a bill of sale and assignment to Tecnique, Inc., of New Jersey. At the time of the execution of these documents in December, 1959, Shulton, Inc., not only owned all of the shares of stock of Tecnique of Minnesota, the assignor, but also owned all of the stock of Tecnique, of New Jersey, the assignee. Shulton was and is, in our view, the principal defendant and the two Tecnique corporations were and are mere instrumentalities.

If Petitioners were to be relegated to the District Court of Minnesota, they would face the problem of obtaining jurisdiction over Shulton and Tecnique of New Jersey. It is possible that an argument could be made that ancillary jurisdiction over Tecnique of New Jersey, although not found in the district, could be obtained (on the authority of *Butler v. Ungerleider*, 187 F. 2d 238 (2d Cir., 1951) on the theory that it is the assignee, once removed, of the rights of La Maur, Inc. (La Maur, Inc., to Tecnique, Inc., of Minnesota, to Tecnique, Inc., of New Jersey). It is, however, at least doubtful whether or not such a theory of ancillary jurisdiction could be sustained. Moreover, Shulton, Inc., the principal defendant, could not be found in the District of Minnesota and since Shulton does not appear either in the original action or as an assignee, however remote, there is no basis for obtaining jurisdiction

in Minnesota in an independent action or in any proceeding ancillary to the original action. It therefore appears that in Minnesota, the possibility of obtaining personal jurisdiction of Tecnique, Inc., of New Jersey, is doubtful and there is no possibility at all of obtaining personal jurisdiction of the defendant Shuiton, Inc.

The Writ of Audita Querela was utilized at common law to give relief only from common law judgments (Moore and Rogers, Federal Relief from Civil Judgments, 1946, 55 Yale L.J. 623, 638). Since we are seeking relief from an injunction issued by the District Court of Minnesota, the writ of audita querela or any theory of relief predicated upon such a writ, would not be available in a proceeding in equity as a matter of substantive law. Similarly, the remedy formerly available by a bill of review or a bill in the nature of a bill of review was predicated upon the existence of the following grounds, none of which is present in the instant case:

(a) Error of law apparent on the face of the record without further examination of matters of fact;

(b) Because of new facts discovered since the decree which would materially affect the decree and probably induce a different result.

(c) Fraud in procuring the decree. (Moore and Rogers, Federal Relief from Civil Judgments, 1946, 55 Yale L.J. 623, 639.)

Petitioners sought relief only from the prospective application of the injunction on the ground that changed conditions since the issuance of the decree made such prospective application inequitable. The Court of Ap-

peals found no authority for such an action under pre-existing powers preserved to the Courts by its construction of Rule 60(b). Yet Professor Moore, in his analytical article of 1946, included an elaborate discussion of the independent action (Moore and Rogers, Federal Relief from Civil Judgments, 1946, 55 Yale L.J. 623, 653-654):

> "The nature of the independent action is such that a court of equity may restrain not only the enforcement of equitable decrees but also judgments at law; and the decree or judgment need not have been rendered by the court whose equitable jurisdiction is invoked. Thus a federal court, in a proper case, could enjoin the enforcement not only of a federal judgment, but of a judgment or decree of a state tribunal. This latter principle has been carried to the point of sustaining jurisdiction to relieve against a divorce decree although the federal courts have no original jurisdiction over divorce proceedings." [Citing *McNeil v. McNeil*, 78 F. 834 (C.C.N.D. Cal. 1897).]
>
> "Formerly it was well settled that 28 U.S.C. §379, generally forbidding the use of a federal injunction 'to stay proceedings in any court of a state,' did not prevent federal courts 'from depriving a party by means of an injunction, of the benefit of a judgment obtained in a state court in circumstances where its enforcement would be contrary to recognized principles of equity in the standards of good conscience.'" [Citing *Wells Fargo & Co. v. Taylor*, 254 U.S. 175, 183 (1920); *Marshall v. Holmes*, 141 U.S. 589 (1891); *Simon v. Southern Railway*, 236 U.S. 115 (1915); *Atchi-*

son, Topeka & Santa Fe Ry. v. Wells, 265 U.S. 101 (1924)]

"A reasonable view was that by entertaining such actions a court is not interfering with the processes of another court and barring the latter's judgment, but is merely acting upon the holder of the judgment who is within its jurisdiction; the bill to impeach or enjoin does not operate to review, undo or reverse the decree or judgment but merely seeks to deny the other party of the fruits thereof."

4. The District Court granted the motion of the defendants to dismiss, made after both defendants had appeared in the action and had filed a joint answer, on the ground that the defendant Tecnique, Inc., was an indispensable party who had not been properly served. The District Court, in order to arrive at this result, was required to decide:

(a) That Tecnique, Inc., of New Jersey, was a corporate entity which had rights, independent of the defendant Shulton (who was admittedly before the court) of such substance that the trial court could not proceed without Tecnique, Inc. of New Jersey;

(b) That Tecnique, Inc., which was organized by Shulton on the very day (August 19, 1959) when Shulton agreed to purchase from La Maur the shares of Tecnique, Inc., of Minnesota, acquired certain rights to a formula for hair dye and to an injunction by a series of assignments and bills of sale executed four months after Shulton acquired the stock of Tecnique, Inc. of Minnesota;

(c) That the right to the formula for hair dye and to the injunction were assignable and that the instruments of conveyance were bona fide instruments supported by a valid consideration rather than formal acts by two servants of the same master without genuine substance or significance.

(d) That in spite of the obvious interrelationship, Tecnique was a separate entity and not the *alter ego* of Shulton, Inc.;

(e) That Shulton was not the agent of Tecnique through which Tecnique (if it has any substance at all) does business within the district where the appellees asserted that there was an oral agreement between the two;

(f) That Tecnique was not doing business directly within the district.

It will readily be seen that these subparagraphs describe issues which involve questions of substantive law which should be resolved only after a plenary trial. In recognition of this fact, petitioners, after the original District Court opinion had been rendered, made a motion pursuant to Rule 59, Federal Rules of Civil Procedure, as follows:

(1) For a rehearing on the defendant's motion to dismiss;

(2) To open the judgment and to take additional evidence under Rule 59 (a) (2);

(3) For a plenary trial upon the jurisdictional issues raised by defendant's motion to dismiss;

(4) To alter or amend the judgment heretofore entered [R. p. 234].

This motion was denied by the District Court and further discovery was foreclosed even though the following evidence was placed before the Court:

> "1. Tecnique (New Jersey) was organized by the appellee Shulton on August 19, 1959 (defendants' answer to (plaintiffs') interrogatory 20, (R. p. 164, lines 11-13) for the purpose of acquiring and continuing the business of Tecnique (Minnesota) (Bangs' affidavit, R. p. 266, lines 12 to 14). This was the same day on which stock purchase agreements for the sale of the stock of Tecnique (Minnesota) were executed (defendants' answer to plaintiffs' interrogatory 28, R. p. 165, lines 11-17).
>
> 2. The Bill of Sale from La Maur, Inc. to Tecnique (Minnesota) [R. p. 192-193] and the assignment of the judgment and decree from La Maur, Inc., to Tecnique (Minnesota) were dated December 17, 1959, eight years after the injunction had issued and four months after La Maur, Inc. had sold its shares in Tecnique (Minnesota) to Shulton.
>
> 3. The Bill of Sale from Tecnique (Minnesota) to Tecnique (New Jersey) [R. p. 194-195 was executed by Richard M. Parks and Nicholas J. Livoti. Parks was not only a Vice President and Director of Shulton (defendants' answer to plaintiffs' interrogatories 16 and 17, R. p. 163, lines 8-9 and 29) but also a Vice President of Tecnique (Minnesota) (R. p. 195) and a Vice President of Tecnique (New Jersey) (R. p. 162, lines 20-25). Nicholas J. Livoti was not only an Assistant Secretary of Shulton (R. p. 163, lines 21-22) but

was also Secretary of Tecnique (Minnesota) (R. p. 195) and Secretary of Tecnique (New Jersey) (R. p. 162, line 24). These gentlemen simultaneously represented both parties to this transaction and the sole shareholder of both the assignor and the assignee.

4. At the time of the execution of the said Bills of Sale and Assignment in December, 1959, the defendant Shulton not only owned all of the shares of stock of Tecnique (Minnesota), the assignor, but also owned all of the shares of stock of Tecnique (New Jersey), the assignee. The individuals who acted for the assignor, Technique (Minnesota) and for the assignee Tecnique (New Jersey) were both corporate officers of Shulton and one was also a member of the Board of Directors of Shulton.

5. In addition to the documents themselves, the transaction by which La Maur, Inc. sold its shares in Technique (Minnesota) was described once by La Maur and once by Shulton in the public records of the Securities & Exchange Commission (see letter dated August 24, 1962, from Raymond J. Sullivan, Chief, Public Reference and Correspondence Section, Securities & Exchange Commission, R. p. 242).

(a) In the Spring of 1962, La Maur, Inc., through Paine, Weber, Jackson & Curtis, Stockbrokers, undertook a substantial public offering of its shares and filed a Registration Statement with the Securities & Exchange Commission. This filing occurred more than two years after the stock sale to Shulton but, in accordance with the require-

ment of the Commission, the transaction was described at length as follows:

"In 1959 the Company sold to Shulton, Inc., a cosmetics manufacturer, its preferred stock in a corporation known as Tecnique, Inc., a distributor of permanent hair coloring products, a hair lightener and a hand cream. The Company received $50,000 on the sale of its stock and, as its cost basis therein was $2,730 the Company realized a long-term capital gain, after expenses in connection with the sale, of $45,487. Shulton, Inc., also acquired at the time it purchased the Company's preferred stock in Tecnique, Inc., all of the common stock thereof.

"The Common Stock of Tecnique, Inc. was owned as follows: Maurice L. Spiegel—70%, Walter C. Smith—15%, Sigmund B. Pass, an unaffiliated person—15%.

"The Company did all of the manufacturing of Tecnique's products under an arrangement whereby the Company was paid its costs plus 10% plus a percentage of certain other operating costs. The percentages of the Company's sales to Tecnique to the Company's total sales in the calendar years 1957, 1958 and 1959 were as follows:

Year	Percentage of Company's Sale to Tecnique to Company's Total Sales
1957	5.85
1958	5.12
1959	4.59

"In connection with the sale of the Tecnique stock, the Company gave to Shulton, Inc. a covenant not to compete, under which the Company agreed, in essence: that it would not for a period of 25 years manufacture, sell, distribute or license any products under the label of 'Tecnique' nor for such 25-year period would it use the word 'Tecnique' alone or in conjunction with other words'; and that, for a period of 5 years, it would not manufacture, sell, distribute or license any permanent hair coloring, as distinguished from a temporary hair coloring; and that, for a period of 5 years, it would not manufacture, sell, distribute or license any products for the retail trade competitive with any product marketed by Tecnique for the retail trade at the time of the above sale of that company's preferred stock. As indicated by the above, the products that were then marketed by Tecnique to the retail trade were permanent hair coloring products, a hair lightener and a hand cream." [R. pp. 243 and 244.]

This is a clear and unequivocal statement by La Maur, the seller of the shares of Tecnique (Minnesota) that the buyer of the shares was Shulton; that a restrictive covenant was given by La Maur to Shulton and there is no mention whatever of Tecnique (New Jersey).

(b) The Form 10K (Annual Report) filed by Shulton, Inc., for the year 1959, in accordance with Section 15(d) of the Securities & Exchange Act of 1934 and Rule X-15D-1 of the General Rules and Regulations under the Securities Act of

1934, within 120 days after the close of the year, was also before the trial court. [R. p. 245.] In this form, prepared and filed before this litigation was commenced, Shulton stated that it acquired all of the capital stock of Tecnique (Minnesota); that it (Shulton) dissolved Tecnique (Minnesota) and the assets were subsequently conveyed to and its liabilities were subsequently assumed by Tecnique (New Jersey).

These statements, made independently by La Maur, the seller, and Shulton, the buyer, before this litigation was commenced and in official reports to a regulatory agency of the United States Government, directly refute the sworn statements of Mr. Livoti to the effect that Tecnique (New Jersey) acquired all of the stock of Tecnique (Minnesota) [R. p. 164, lines 14-17] and that Shulton did not acquire all of the stock of Tecnique (Minnesota). [R. pp. 18-21.] It also refutes the affidavit of Mr. Bangs, House Counsel for Shulton, in which he states that Tecnique (New Jersey) purchased the shares of Tecnique (Minnesota) [R. p. 266, lines 12-18] although Mr. Bangs may perhaps be excused since he is discussing a transaction which occurred (August, 1959) before he became employed by Shulton (September, 1959).

Further support plaintiffs' claim that Shulton was the real party in interest and the actual purchaser of the shares of Tecnique (Minnesota) comes from Mr. Melvin Siegel of the Minneapolis firm of Leonard, Street and Deinard who was admitted specially to argue the motion to dismiss before the District Court. After counsel for the plaintiffs had presented to the Court the records of the Securities & Exchange Commission

contradicting not only the answer [R. p. 18, line 32, to p. 19, line 3] but also the affidavit of Mr. Bangs [R. p. 266, lines 12-18] and defendants' answer to plaintiffs' interrogatories 21 and 22 [R. p. 164, lines 14-21]. Mr. Siegel confirmed the plaintiffs' contentions in the following language:

> "I do want to comment as to the statements that were made, though they were not called to my attention by way of service of affidavit, but I am familiar with the facts. And since he has seen fit to call your Honor's attention to documents which have not even been called to your Honor's attention, let me state what I think appears in the answers to the interrogatories as to how the sale took place.
>
> "Shulton purchased from La Maur all of the stock which La Maur held in Tecnique of Minnesota. And it also purchased from Tecnique of Minnesota all of Tecnique of Minnesota's stock.
>
> "Consequently, Tecnique of Minnesota then and there became a 100 per cent owned subsidiary of Shulton, just as Tecnique of New Jersey now is.
>
> "So it is true that La Maur did sell its stock interest in Tecnique of Minnesota to Shulton, and Tecnique of Minnesota sold its stock interest to Shulton." [Rep. Tr. p. 64, line 16, to p. 65, line 7.]

In the light of the sworn statement by the seller, La Maur, that it sold the shares of Tecnique (Minnesota) to Shulton and the statement by Shulton, the buyer, that it purchased the shares of Tecnique (Minnesota) and the tatement of Mr. Siegel, it is extremely

difficult for us to see how the District Court could have found in Tecnique (New Jersey) an interest in the subject matter of this litigation of such substance as to render it an indispensable party where Shulton was already a defendant and admittedly before this Court.

6. Tecnique (New Jersey) has no manufacturing facilities separate from Shulton, Inc. [defendants' answer to plaintiffs' interrogatory 11, R. p. 161, lines 26-29].

7. Tecnique (New Jersey) has no warehouse or storage facilities separate from Shulton, Inc. [defendants' answer to plaintiffs' interrogatory 12, R. p. 161, lines 30-32 and p. 162, line 1].

8. Tecnique (New Jersey) occupies the same business premises as Shulton, Inc. in Passaic, New Jersey [defendants' answer to plaintiffs' interrogatory 6, R. p. 161, lines 1-4].

9. The following are officers and directors common to Shulton, Inc., Tecnique (New Jersey) and, in part, Tecnique (Minnesota):

(a) Richard N. Parks is Vice President of Tecnique (New Jersey) [defendants' answer to plaintiffs' interrogatory 14, R. p. 162, line 23]; Vice President of Shulton, Inc. [defendants' answer to plaintiffs' interrogatory 16, R. p. 163, lines 8-9]; a member of the Board of Directors of Shulton, Inc. [defendants' answer to plaintiffs' interrogatory 17, R. p. 163, line 29]; and was a Vice President of Tecnique, Inc., Minnesota as of December 18, 1959 [see Bill of Sale December 18, 1959, from Tecnique, Inc. Minnesota to Tecnique, Inc. New Jersey, Exhibit C to affidavit of Ni-

cholas J. Livoti in support of defendants' motion to dismiss, R. p. 195].

(b) Nicholas J. Livoti is Secretary of Tecnique, Inc., New Jersey [defendants' answer to plaintiffs' interrogatory 14, R. p. 162, line 24]; Assistant Secretary of Shulton, Inc. [defendants' answer to plaintiffs' interrogatory 16, R. p. 163, lines 21-22]; and was Secretary of Tecnique, Inc., Minnesota, as of December 18, 1959 [see Bill of Sale December 18, 1959, from Tecnique, Inc., Minnesota, to Tecnique, Inc., New Jersey, Exhibit C to affidavit of Nicholas J. Livoti in support of defendants' motion of dismiss, R. p. 195].

(c) William H. O'Brien is Treasurer of Tecnique, Inc., New Jersey [defendants' answer to plaintiffs' interrogatory 14, R. p. 162, line 25]; a member of the Board of Directors of Tecnique, Inc., New Jersey [defendants' answer to plaintiffs' interrogatory 15, R. p. 162, line 30]; Vice President of Shulton, Inc. [defendants' answer to plaintiffs' interrogatory 16, R. p. 163, lines 12-13]; and a member of the Board of Directors of Shulton, Inc. [R. p. 163, line 32].

(d) George L. Schultz is a member of the Board of Directors of Tecnique Inc., New Jersey [defendants' answer to plaintiffs' interrogatory 15, R. p. 162, line 28]; President of Shulton, Inc. [defendants' answer to plaintiffs' interrogatory 16, R. p. 163, lines 3-4]; and a member of the Board of Directors of Shulton, Inc. [R. p. 163, line 27].

All of the officers and directors of Tecnique (New Jersey), with the single exception of Sig Pass, are officers and or directors of Shulton, Inc.

10. Tecnique (New Jersey) carries on business correspondence on stationery of Shulton, Inc. [R. p. 246].

11. Shulton, Inc., dealt as the principal in connection with the very subject matter of this litigation [see letter dated July 31, 1961, on Shulton, Inc., letterhead signed by Goerge L. Schultz, President, R. p. 247; see letter dated June 26, 1962, on Shulton, Inc., letterhead signed by John K. Bangs, House Counsel, R. p. 248].

12. Shulton, Inc., advertises and sells "Tecnique by Shulton" not only to the retail trade [see Exhibit G, R. p. 249, and Exhibit H, R. p. 250], but also to the *professional trade*. Mr. Livoti was wrong when he answered plaintiffs' interrogatory 13 in which he tried to establish that Shulton, Inc., sold only to the retail trade, while Tecnique, New Jersey, sold only to the professional trade. That Shulton, Inc., sells directly to the professional trade is shown by the following exhibits:

(a) Exhibit I—Advertising brochure by "Shulton-Tecnique Division" which clearly shows a "*professional package*" [R. p. 251];

(b) Exhibit J—Double page advertisement for "Tecnique *Professional* Color-Tone by Shulton" [R. pp. 252 and 253];

(c) Exhibit K—Advertisement by "Shulton-Tecnique Division" for *professional trade* [R. p. 254];

(d) Exhibit L—Advertisement by "Shulton Tecnique Division" for *professional trade* [R. p. 255].

Exhibits I, J, K and L were obtained by plaintiffs' counsel in the course of preparation for this action in 1962.

13. There is evidence in the record that Breiseth and Williams of Shulton, Inc., make sales calls for "Tecnique" on Mercury Beauty Supply of Los Angeles and that "Tecnique" is ordered by that company by telephoning "SP 6-1888" which is the telephone number listed on page 1267 of the Los Angeles Central Telephone Directory for "Shulton, Inc. 5431 West 104th St." [R. unnumbered page between pp. 240 and 241, lines 27-32, p. 241, lines 1-4].

14. Tecnique, Inc., New Jersey, and Tecnique, Inc., Minnesota, were wholly-owned subsidiaries of Shulton, Inc., in December 1959, and Tecnique, Inc., New Jersey, has remained a wholly-owned subsidiary of Shulton, Inc., as of the date of this action [paragraph I of joint answer of Shulton, Inc., and Tecnique, Inc., New Jersey, admitting allegation to the effect in paragraph I of the complaint herein, R. p. 8, lines 23-27].

It therefore appears that plaintiffs, in spite of the refusal of the District Court to allow pre-trial discovery after the motion to dismiss was filed, have nevertheless established by a fair preponderance of the credible evidence that Tecnique (New Jersey) is simply an instrumentality which has no rights of substance apart from those of Shulton, Inc; that Shulton, Inc., is the real party in interest and is properly before the Court and that Tecnique (New Jersey) is neither a necessary nor an indispensable party to this action.

We believe that the District Court was in error on two grounds: First, in denying petitioners a plenary trial since the jurisdictional issues were substantially the same as substantive issues to be decided in the case and, Second, in refusing to allow petitioners a reason-

able opportunity to complete their discovery on the issues raised by the motion to dismiss.

We recognize that where a jurisdictional issue to be determined in a non-jury case is clearly separate from the issues as to the merits of the controversy, a district court may try the jurisdictional issue summarily upon motion and by affidavit; see *Land v. Dollar*, 330 U. S. 731, 735 (1947). However, where a jurisdictional issue coincides in whole or in substantial part with an issue going to the merits, it has been held that considerations of policy underlying the due process concept require that a determination of such issues be made only after a plenary trial, even in non-jury cases. See:

Magenau v. Aetna Freight Lines, 360 U. S. 273, 278 (1959);

Byrd v. Blue Ridge Rural Electric Cooperative, 356 U. S. 525, 533-540 (1958);

Smithers v. Smith, 204 U. S. 632, 642-646 (1907);

Marks Food Corp. v. Barbara Ann Baking Co., 274 F. 2d 934, 936 (9th Cir., 1959);

Fireman's Fund Ins. Co. v. Railway Express Agency, 253 F. 2d 780, 783-785 (6th Cir., 1958);

Taylor v. Hubbell, 188 F. 2d 106, 108-109 (9th Cir., 1951), Cert. denied, 342 U. S. 818 (1951);

Shaffer v. Coty, Inc., 183 F. Supp. 662, 667 (S.D. Cal. 1960);

Williams v. Minnesota Mining & Manufacturing Co., 14 F.R.D. 1, 7-9 (S.D. Cal. 1953).

The foregoing conclusion to the effect that the District Court erred in refusing Petitioners a plenary trial presupposes that in connection with such trial, the Petitioners would have been afforded normal pre-trial discovery. However, even where the District Court may summarily dispose of the jurisdictional issues, it is nevertheless incumbent upon the Court to allow the parties a reasonable opportunity to complete discovery where the defendants have, by affidavit, raised issues as to facts which bear on the jurisdiction of the Court. See:

River Plate Corp. v. Forestal Land, Timber & Railway Co., Ltd., 185 F. Supp. 832 (S.D. N.Y. 1960);

General Ind. Co. v. Birmingham Sound Reproducers, Ltd., 26 F.R.D. 559 (E.D. N.Y., 1961);

Ziegler Chemical & Mineral Corp. v. Standard Oil of Calif., 32 F.R.D. 241 (N.D. Cal. 1962).

Conclusion.

The decision of the Ninth Circuit Court of Appeals, in effect, frustrates the expressed intention of the Advisory Committee in recommending amendments to Rule 60(b) and presumably, the intention of this Court in adopting the amendments. It creates a retrogression to the complexity and uncertainty of the old common law writs in spite of the obvious efforts since 1938 to up date federal procedure. It denies the petitioners an opportunity to be heard in the only district in which all parties can be found.

We would hope we will find in this Court a response similar to that of the Court of Appeals for the Sec-

ond Circuit in *Markert v. Saifi & Co., Inc.*, 173 F. 2d 517, 518 (2d Cir., 1949):

> "Though the case has been shunted back and forth between trial and appellate courts, it has not yet progressed beyond an exercise in pleading niceties. Modern impatience with procedural formalities suggests the probable unproductiveness of such a course, which we must now underscore by our holding that plaintiffs cannot properly be denied opportunity to present the case they believe they have."

We believe the judgment of the United States Circuit Court of Appeals for the Ninth Circuit should be reversed and to that end the writ herein prayed for should issue.

Respectfully submitted.

FRANCIS GEORGE STAPLETON
Attorney for Petitioners.

APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

Albert Lapin and Lapinal, Inc., Appellants, vs. Shulton, Inc., and Tecnique, Inc., Appellees. No. 18,775.

May 27, 1964

On Appeal from the United States District Court for the Southern District of California, Central Division.

Before: Jertberg, Merrill and Browning, Circuit Judges.

Merrill, Circuit Judge:

This appeal is taken from judgment entered on motion of appellees, dismissing the action for lack of jurisdiction.

Appellant brought suit in Los Angeles in the District Court for the Southern District of California, Central Division, under Rule 60 (b) F.R.C.P.[1] to dissolve an injunction issued July 5, 1951 by the United States District Court of Minnesota upon the ground that changed circumstances had rendered inequitable the prospective application of the decree.[2] The injunction so issued

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[1]In pertinent part this rule provides:

"On motion, and upon such terms as are just, the court may relieve a party * * * from a final judgment, order, or proceeding for the following reasons: * * * (5) * * * it is no longer equitable that the judgment should have prospective application * * *."

[2]The complaint asserts:

"The changed conditions arising since the issuance of the injunction in 1951 have made the prospective appli-

ran in favor of LaMaur, Inc., which since has transferred its rights thereunder to appellee Tecnique, Inc., a wholly owned subsidiary of appellee Shulton, Inc.

Tecnique, appearing specially, and Shulton moved to dismiss the action upon two grounds: (1) that although Shulton had been properly served with process, Tecnique had not been properly served and was an indispensable party; (2) that in any event jurisdiction to dissolve the injunction lay exclusively with the Minnesota District Court.

The order of the district court below, granting dismissal, was based upon the first ground. The court, although not deciding the question, also expressed an opinion that on the second ground as well it was without jurisdiction.

We do not reach the issues presented by the first ground. We decide only that the present proceedings to secure dissolution of an injunction on the grounds here asserted should have been brought in the issuing court, the District Court of Minnesota, and that the trial court was thus correct in refusing to entertain the action.

It is clear that the issuing court has continuing jurisdiction to modify or revoke an injunction as changed circumstances may dictate.

In *U.S. v. Swift & Compa...* (1932) 286 U.S. 106, 114-115, the court stated:

> "We are not doubtful of the power of a court of equity to modify an injunction in adaptation to

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cation of the injunction inequitable and oppressive to plaintiffs and of no legitimate benefit to defendants." The complaint prays judgment dissolving the injunction.

changed conditions though it was entered by consent * * *. Power to modify the decree was preserved by its very terms, and so from the beginning went hand in hand with its restraints. If the reservation had been omitted, power there still would be by force of principles inherent in the jurisdiction of the chancery. A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need * * *. [A] court does not abdicate the power to revoke or modify its mandate if satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong."

In *System Federation No. 91, Railway Employes' Dep't v. Wright* (1961) 364 U.S. 642, 647, the court said:

"There is * * * no dispute but that a sound judicial discretion may call for the modification of the terms of an injunction decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen. The source of the power to modify is of course the fact that an injunction often requires continuing supervision by the issuing court and always a continuing willingness to apply its powers and processes on behalf of the party who obtained that equitable relief."

As to the authority of courts other than the one rendering judgment or decree, Rule 60(b) provides:

"This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant

relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."

As we construe this provision, it preserves to courts the powers which theretofore they had been free to exercise under the specified writs or otherwise, but does not purport to grant new power and authority not theretofore recognized. See Notes of Advisory Committee to Rule 60(b); 3 Barron & Holtzoff, Federal Practice and Procedure (1958), §1331; 7 Moore, Federal Practice (1955), ¶¶60.36-60.37. Under the pre-existing powers thus preserved to the courts we find no authority to entertain an original action such as the one before us.

The writ of audita querela provides relief from a judgment at law because of events occurring subsequently which should cause discharge of a judgment debtor. See 3 Barron & Holtzoff, supra, §1331 at page 429. While, formally, this is an independent action, the rule appears to be that the writ may be brought only in the court which rendered the judgment. *Eureka Casualty Company v. Municipal Court of Los Angeles* (1934) 136 Cal.App. 195, 28 P.2d 708; see Moore & Rogers, Federal Relief from Civil Judgments (1946) 55 Yale Law Journal 623, 661.

The equitable counterpart of audita querela by which relief from equitable decrees may be secured is the bill

of review. One recognized ground for such relief is that changed circumstances render enforcement inequitable. See Moore & Rogers, *supra*, at pages 675-681; 10 Nichols Cyclopedia of Federal Practice (3d. Ed. 1952) §37.26, at page 335.

Nichols, *supra*, states that bills of review in general "were filed in the court in which the decree was rendered." Courts also have recognized that a bill of review, although not actually a part of the original suit, is deemed to be a continuation of that action and ancillary to it. *Pacific Railroad of Missouri v. Missouri Pacific Railroad Company* (1884), 11 U.S. 505, 522; *Zegura v. U.S.* (5 Cir. 1939), 104 F.2d 34, 35, cert. denied (1939) 308 U.S. 586; see also *Hartford-Empire Company v. Hazel-Atlas Glass Company* (3 Cir. 1941) 125 F.2d 976.

In *Deposit Bank v. Frankfort* (1903) 191 U.S. 499, it was held that relief from an injunction clearly warranted by a change in governing law must be secured from the issuing court. There the Federal Circuit Court for the District of Kentucky had perpetually enjoined the city from collecting a certain tax from the bank. It had based its judgment and decree squarely upon the decision of a lower state court to the effect that a previous state law which had exempted the bank from such a tax constituted a binding contract between the state and the bank, with the result that even after its repeal the bank was exempt from the tax. The injunctive decree was affirmed by the United States Supreme Court. The Court of Appeals of Kentucky then reversed the lower state court's decision on which the injunction-issuing Federal court had relied, holding that the previous law was not a contract and that the bank

was no longer exempt from the tax. After a remand, and on subsequent appeal, the Kentucky Court of Appeals held that because of the now-settled erroneousness of the decision on which the Federal Circuit Court relied, its decree was not a binding estoppel on the parties in a state court action by the city to collect the tax. On appeal from this decision the United States Supreme Court reversed, stating at page 512:

> "It is to be remembered that we are not dealing with the right of the parties to get relief from the original judgment by bill of review or other process in the Federal court in which it was rendered. There the court may reconsider and set aside or modify its judgment upon seasonable application. In every other forum the reasons for passing the decree are wholly immaterial and the subsequent reversal of the judgment upon which it is predicated can have no other effect than to authorize the party aggrieved to move in some proper proceeding, in the court of its rendition, to modify it or set it aside. It cannot be attacked collaterally, and in every other court must be given full force and effect, irrespective of the reasons upon which it is based."

In our judgment sound reasons of policy support the proposition that relief should be sought from the issuing court.

It is true that if a court other than the issuing court were to grant relief such relief could technically operate only upon the parties and not on the decree itself. See 7 Moore, *supra*, ¶60.36, at pages 603-604. Nevertheless, for a nonissuing court to entertain an action for such relief would be seriously to interfere with, and

substantially, to usurp, the inherent power of the issuing court (as discussed in *Deposit Bank v. Frankfort* and *System Federation v. Wright*, supra), to supervise its continuing decree by determining from time to time whether and how the decree should be supplemented, modified or discontinued in order properly to adapt it to new or changing circumstances.

We need not go so far as to hold that these considerations and this interpretation of Rule 60(b) deprive all courts other than the issuing court of jurisdiction in such a case as this. We do hold that considerations of comity and orderly administration of justice demand that the nonrendering court should decline jurisdiction of such an action and remand the parties for their relief to the rendering court, so long as it is apparent that a remedy is available there.

In this respect we approve the decision and language of the District Court for the Southern District of New York in *Torquay Corporation v. Radio Corporation of America* (S.D.N.Y. 1932) 2 Fed.Supp. 841.

There the United States, in the Federal District Court of Delaware, had obtained a consent decree requiring General Electric and Westinghouse to divest their stock in R.C.A. in certain ways and within specified times, enjoining continued existence of various license agreements, specifying in detail various acts which might and might not be done and retaining jurisdiction for the purpose of enforcing or modifying the decree. The plaintiff corporation brought an action in the Southern District of New York as an R.C.A. stockholder, complaining that General Electric, Westinghouse and R.C.A. had deceived the District Court of Delaware as a result of which R.C.A. was losing rights and was being

deprived of fair and adequate consideration for the stock with which it had parted, to the unjust enrichment of General Electric and Westinghouse. The prayer for relief was that General Electric and Westinghouse be required to retransfer to R.C.A. their stock in that company; that a receiver be appointed to take possession of the stock and that it be declared the absolute property of R.C.A.

The District Court declined relief, stating, at page 844:

> "Assuming for the moment that this court has jurisdiction of the present suit, it is clear, as a matter of comity and of the orderly administration of justice, that this court should refuse to exercise its jurisdiction to interfere with the operation of a decree of another federal court. Especially is this so where it is clear that the United States District Court in Delaware would have jurisdiction of such a suit as is now before this court. A bill to modify or restrain the enforcement of a decree of a federal court may undoubtedly be brought in the court which entered such decree. * * * [C]omplainant's rights, if any, would seem to be more properly justiciable in the court that made the decree, out of which complainant's grievance arises, than here."

Affirmed.

APPENDIX B.

Order Granting Defendants' Motion to Dismiss.

In the United States District Court, Southern District of California, Central Division.

Albert Lapin and Lapinal, Inc., Plaintiffs, vs. Shulton, Inc. and Tecnique, Inc., Defendants. No. 62-913 MC.

Defendants' motion to dismiss was heard November 20, 1962, Melvin H. Siegel, Esq., and William S. Scully, Jr., Esq., appearing for defendants, and F. G. Stapleton, Esq., appearing for plaintiffs.

Plaintiff has filed suit in this court under Rule 60 (b) of the Federal Rules of Civil Procedure to dissolve an injunction granted by the United States District Court of Minnesota, Fourth Division, and served Norton M. Breiseth, Regional Manager of defendant, Shulton, Inc., in Los Angeles, California. Mr. Breiseth, by affidavit, states he is not connected in any way with the other defendant, Tecnique, Inc., which is a New Jersey corporation that is not licensed to do business in California and does not have solicitors, employees, salesmen or other representatives in California.

From defendants' answer to plaintiffs' interrogatories and the affidavit of Nicholas J. Livoti, who is both secretary of Tecnique, Inc. and assistant secretary of Shulton, Inc., it appears that defendants are separate and distinct corporations, although Tecnique, Inc., of New Jersey, is a wholly owned subsidiary of defendant Shulton Inc.

It further appears that Tecnique, Inc. is the owner of the decree of injunction sought to be dissolved by this action and is therefore an indispensable party.

Plaintiff contends that defendants are one and the same, that Tecnique of New Jersey has no substance, is the alter ego of defendant Shulton, Inc., and that the corporate entity should be disregarded.

It appears to the court that the corporate separation is real and not mere fiction and should not be ignored to determine jurisdiction.

While the above is determinative of the within matter, the court feels it should address itself briefly to the other major contention of defendant that any relief obtained by means of the motion provided by Rule 60(b) of the Federal Rules of Civil Procedure must be obtained in the United States District Court of Minnesota, where the original Decree of Injunction was issued. This is true as far as it goes, but it is also true that Rule 60(b) contemplates two types of procedure to obtain relief from a final judgment. 7 Moore's Federal Practice (2nd Ed.) Section 60.28 [1], p. 312. In addition to proceeding by motion, it is stated at page 312 that a party may proceed by a new or independent action, "which may or may not be instituted in the district court which rendered the judgment."

This language seems to indicate that an independent action could be brought on any of the grounds listed under Rule 60(b), including 60(b)(5), to the effect that "it is no longer equitable that the judgment should have prospective application." However, the discussion of the substantive bases for an independent action at 7 Moore's p. 600, et seq., indicates that such independent actions lie for fraud, accident or mistake, where the judgment is void, where, in light of newly discovered evidence, it would be unconscionable to give effect to a judgment.

There appears to be no case wherein a decree injunction rendered by a federal district court in one district has been dissolved by a court of another district on the ground that the prospective application of the injunction is no longer equitable, and, while it is not necessary at this time to decide the issue, this court is of the opinion that the relief sought by plaintiff should only be sought by motion in the district court where the original decree was issued.

This court having found that there was no proper service upon Tecnique, Inc., an indispensable party.

It Is Ordered that defendants' motion to dismiss the complaint is hereby granted.

Dated: November 30, 1962.

M. D. Crocker
United States District Judge

APPENDIX C.

Memorandum and Order.

In the United States District Court, Southern District of California, Central Division.

Albert Lapin and Lapinal, Inc., Plaintiffs, vs. Shulton, Inc. and Tecnique, Inc., Defendants. No. 62-913 MC.

This cause came before the court for hearing on plaintiff's Motion to Amend and Modify Judgment, pursuant to Rule 59, Federal Rules of Civil Procedure; F. G. Stapleton of Stapleton, Weinberg and Isen, appearing for plaintiff; and William S. Scully of Hill, Farrer & Burrill, appearing for defendant; plaintiff asking specifically the following of the court:

1. A rehearing under Rule 59 of the Federal Rules of Civil Procedure of the defendants' motion to dismiss the complaint;

2. To open the judgment and to take additional evidence by deposition or affidavit under Rule 59 (a)(2);

3. For a plenary trial upon the jurisdictional issue raised by the defendants' motion to dismiss;

4. To alter or amend the judgment heretofore entered in this action under Rule 59.

Upon oral argument, plaintiff emphasized his request that the judgment be opened for the purpose of allowing the affidavit of F. G. Stapleton, with attached exhibits, to be made part of the record, but he also urged that a plenary trial should be held on the jurisdictional issue involved, and that in the present circumstances the judgment should be modified to read "without prejudice."

Defendants for their part, in connection with their brief in opposition to the present motion, have filed two additional affidavits and request that in the event the affidavit of F. G. Stapleton is made a part of the record these also be made a part thereof.

After oral argument the cause was submitted to the court for decision.

Plaintiff makes what he terms a "technical" argument that there was no evidence in opposition to the motion to dismiss before the court when it reached its decision, and for this reason he now urges that the affidavit he has submitted be considered by the court.

I have studied the affidavit of F. G. Stapleton and find that it offers no compelling reasons for reaching a different conclusion from that reached by this court in its order entered on December 4, 1962.

It is, at best, an understatement to say that the argument of no evidence before the court is a "technical" one.

The affidavit contains essentially the same information which was argued before the court and submitted in plaintiff's Points and Authorities filed November 21, 1962.

For the purpose of review, however, I feel that the affidavit should enter as part of the record.

Plaintiff next urges that it was error for the court not to provide for a plenary trial on the jurisdictional issue involved, and he cites as authority *Shaffer v. Coty, Inc.*, 183 F. Supp. 692, 699. I quote the following pertinent passage from the opinion of Judge Mathes:

> "Where the jurisdictional issue to be determined in a non-jury case stands apart from the issues as

to the merits of the controversy, as for example a challenge as to citizenship in a diversity case, it is appropriate to try that issue summarily, upon motion, and by receiving and weighing affidavits. [Citations omitted.]

"On the other hand, where a jurisdictional issue coincides in whole or substantial part with an issue going to the merits, as for example a challenge as to the amount of damage in controversy, considerations of policy underlying the due-process concept are said to require that determination be made only after plenary trial, even in non-jury cases." [Citations omitted.]

Admittedly, in a given case, depending on the circumstances, the issue with which we are presently concerned—indispensability of a party not served with process—could either stand apart from *or* coincide with the issues going to the merits. Suffice it to say that in the present situation I feel that it is sufficiently separable to be triable upon motion and affidavits.

The complaint herein seeks the dissolution of an injunction on the ground of its inequitable, prospective application, due to changed conditions. While the complaint does not specify the changed conditions which are relied upon by plaintiff, upon oral argument on the motion to dismiss, counsel did make reference thereto as follows: "The product has changed in ten years." [Tr. 68] "Two, the market has changed in ten years." [Tr. 68] "Third, the competitive strength of the parties. Since we are only talking about money really, the competitive strength of the parties is the key to this thing. If there is any danger that Lapinal with its

$110,000 is a serious threat to Shulton with its $25,000,000. I do not see it." [Tr. 69] It appears then that the changed conditions, as stated by counsel, "relate to a change in the competitive attitude of these two people, Lapinal and Shulton." [Tr. 70]

The jurisdictional issues decided by this court were entirely separable and had only an unsubstantial, if any, effect on the merits of the cause. The evidence shows that through assignments, Tecnique, Inc., of New Jersey, became the owner of the Minnesota decree of injunction. Whether it is, in legal effect, the owner of such decree would have to be determined at a proceeding, to which, it is elementary, Tecnique, Inc. of New Jersey, would be an indispensable party.

For purposes of clarification, it should be understood that this court, in its Order of December 4, 1962, made no finding that Tecnique of New Jersey is, in legal effect, the owner of the decree of injunction which forms the subject of this action. The purport of that Order is that because of its *apparent* ownership Tecnique, of New Jersey, is an indispensable party to any action which seeks to extinguish such injunction and, consequently, the rights therein.

Plaintiff, as a matter of fact, does not seem to dispute that, on paper at least, Tecnique of New Jersey owns the injunction. What plaintiff does emphatically contend is that Shulton is the real party in interest, that Tecnique is only a sham and should be disregarded.

However, even where, as here, the subsidiary is wholly owned by the parent and there are common directors and other features which will enable a court to disregard the corporate existence of the subsidiary, there

should be affirmative reasons for so doing. Here there are no considerations of fraud or other like inequities which would call for treating the two entities as one. What plaintiff's contentions amount to, in effect, is that it would be inequitable to not disregard the corporate existence of Tecnique because if it is not disregarded, under the present circumstances, an action to dissolve the injunction will not be maintainable in this jurisdiction.

Being of the opinion that the present action is properly maintainable only in the District Court where the decree of injunction was rendered [see this court's Order of December 4, 1962, in the present case], I cannot feel that failure to treat Tecnique as a sham at this time leads to an inequitable result.

This, of course, is not a decision on the merits. It does not even preclude the piercing of the same veil in a situation where justice would require it to be pierced. Failure to disregard Tecnique as a separate entity, moreover, does not alter the fact that it is wholly owned by Shulton. This could, and undoubtedly would, be taken to account in a hearing on the merits when considering the 'change in the competitive attitude of these two people, Lapinal and Shulton."

This does not mean that the corporate separation, no matter how formal, should be brushed aside merely because plaintiff would rather bring his action here than elsewhere.

The plaintiff also asks that the judgment of dismissal be modified to read "without prejudice." I feel that this request should be granted. We should not presume to guess that Tecnique will never be found in

California, and plaintiff should not be precluded from bringing another action when, and if, Tecnique should become amenable to the process and jurisdiction of this court. The judgment should be clarified in this respect.

If such a time should arrive, that would be time enough to decide whether an action such as the present one is properly maintainable in some court other than the one which rendered the decree of injunction.

It Is Ordered that the Affidavit of F. G. Stapleton of December 12, 1962, the Affidavits of Norton M. Breiseth and John K. Bangs of December 14, 1962 are hereby made a part of the record of this case;

It Is Further Ordered that the Order of December 4, 1962, in the instant action is hereby amended to read that defendants' motion to dismiss the complaint is granted without prejudice to the bringing of another action when and if it appears that the court can obtain jurisdiction of the defendant Tecnique, Inc.;

It Is Further Ordered that all other requests of plaintiff are hereby denied.

Dated: April 26, 1963.

M. D. Crocker
United States District Judge

APPENDIX D.

Rule 60.

Relief From Judgment or Order.

(b) *Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.* On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as

provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action. As amended Dec. 27, 1946; Dec. 29, 1948, eff. Oct. 20, 1949.

Office Supreme Court, U.S.
FILED
SEP 17 1964
JOHN F. DAVIS, CLERK

In The

Supreme Court of the United States

October Term, 1964

No. 428

ALBERT LAPIN and LAPINAL, INC.,

Petitioners,

vs.

SHULTON, INC., and TECNIQUE, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

LEONARD, STREET AND DEINARD
By: MELVIN H. SIEGEL
818 Farmers and Mechanics Bank Bldg.
Minneapolis, Minnesota 55402
Attorneys for Respondents

Northwest Brief Printing Co., 322 S. Fourth St., Minneapolis, 55415 9-4-64—30

SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statutes Involved	2
Statement of the Case	3
Argument	11
Conclusion	27

AUTHORITIES CITED

CASES:	Page
Anderson v. Abbott, 321 U.S. 349 (1944)	25
A. P. Bliss Co. v. United Car Fastener Co., 116 F. Supp. 291 (D. C., Mass., 1953), aff'd 213 F.2d 541 (C.A. 1, 1954)	24
Butler v. Ungerleider, 187 F.2d 238 (C.A. 2, 1951)	22
Cannon Manufacturing Co. v. Cudahy Packing Co., 267 U.S. 333 (1925)	24, 25, 26
Deposit Bank v. Frankfort, 191 U.S. 499 (1903)	15, 17, 19
Hadden v. Rumsey Products, 196 F.2d 92 (C.A. 2, 1952)	13, 20, 21, 22
Harris v. Deere & Co., 128 F. Supp. 799 (E.D. N.C., 1955), aff'd 223 F.2d 161 (C.A. 4, 1955)	24
Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944)	13, 19, 20
Johnson v. St. Louis, I. M. & S. R. Co., 141 U.S. 602 (1891)	14
Milw. and Minn. R. Co. v. Soutter, 2 Wall. (U.S.) 609 (1865)	22
Niles-Bement-Pond Co. v. Iron Molders' Union, 254 U.S. 77 (1920)	24, 25
Pacific Railroad v. Missouri Pacific Railway, 3 Fed. 772 (C.C. E.D. Mo., 1880)	22
Sayers v. Burkhardt, 85 Fed. 246 (C.A. 4, 1898)	13, 20, 22
State of Pennsylvania v. The Wheeling & Belmont Bridge Co., 18 How. (U.S.) 421 (1856)	16
System Federation No. 91, Railway Employees Dept. v. Wright, 364 U.S. 642 (1961)	15, 17, 19
Torquay Corp. v. Radio Corp. of America, 2 F. Supp. 841 (S.D. N.Y., 1932)	17, 19
United States v. Swift & Co., 286 U.S. 106 (1932)	16
United States v. Throckmorton, 98 U.S. 61 (1878)	14
United States v. Yellow Cab Co., 332 U.S. 218 (1947)	25

RULES: Page

Federal Rules of Civil Procedure:

Rule 43(e) 26

Rule 59 26

Rule 60(b) 11, 12, 13, 14, 15, 17, 18, 19, 21

Rule 60(b)(5) 18

Rule 60(b)(1-6) 21

STATUTES:

Title 28, U.S.C., sec. 1963 ..... 18, 20

TEXTBOOKS:

9 Fletcher Cyclopedia of Corporation (Perm. Ed.), sec. 4473 23

3 Moore's Federal Practice (2d Ed.), sec. 19.12 24

6 Moore's Federal Practice (2d Ed.), sec. 59.04(13) 26

7 Moore's Federal Practice (2d Ed.):

sec. 60.16(2) 11

sec. 60.18(5) 11, 16

sec. 60.28 18

sec. 60.33 ..... 19, 22

sec. 60.34 16

sec. 60.36 14

sec. 60.37(1) 12, 19

sec. 60.37(2) 12, 14, 19, 21, 22

sec. 60.38(2) 22

sec. 60.38(3) 21

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RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 333 F.2d 169. The order and memorandum of the District Court, entered December 4, 1962, is not reported but is reproduced in Appendix B to the Petition (Pet., App., p. 9). The order and memorandum of that court on re-hearing, entered April 29, 1963, is not reported, but is reproduced in Appendix C to the Petition (Pet., App., p. 12).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

In 1951, the United States District Court for the District of Minnesota issued a decree of injunction against petitioners, all rights to which were assigned in 1959 to respondent Tecnique, Inc., a wholly-owned subsidiary of respondent Shulton, Inc. In 1962, petitioners commenced an independent action in the United States District Court for the Southern District of California to dissolve the injunction, on the alleged ground that its prospective operation would be inequitable by reason of changed conditions arising since the issuance of the 1951 injunction.

The sole question presented is whether the latter court should decline to entertain an "independent action" under the saving clause of Rule 60(b), *F.R.C.P.*, for relief on the ground alleged, where an adequate remedy is available by "motion" in the issuing court under Rule 60(b)(5), *F.R.C.P.*

STATUTES INVOLVED

Rule 60(b), *F.R.C.P.*, provides:

> "Rule 60. Relief From Judgment or Order. • • • (b) *Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.* On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying re-

lief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., §1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action. As amended Dec. 27, 1946; Dec. 29, 1948, eff. Oct. 20, 1949."

STATEMENT OF THE CASE

Petitioners commenced this action in the United States District Court for the Southern District of California, Central Division, to dissolve a decree of injunction entered on July 5, 1951 by the United States District Court for the District of Minnesota, Fourth Division, in the case of *Albert Lapin, et al., v. LaMaur, Inc.*, No. 3232, Civil, in the files of that court. For brevity, the decree so entered is hereinafter referred to as the "Minnesota decree," the District Court which entered it as the "Minnesota court," and the District Court in which this action was commenced the "California court."

A brief description of the facts and circumstances leading to the issuance of the Minnesota decree will serve to clarify the issues raised in this proceeding.

On November 22, 1947, petitioners Albert Lapin and his three brothers, Isadore, Samuel and Harold Lapin, granted LaMaur, Inc. (hereinafter for brevity referred to as "La-

Maur"), an exclusive license to manufacture and sell a hair dye, "Tecnique," in accordance with formulas and processes represented by the Lapins to be secret, together with any "improvements" therein (R. 27, 31, 32).[1]

Thereafter, the Lapins commenced an action in the Minnesota court to cancel the license (R. 22). In a counterclaim, LaMaur alleged that the Lapins, through a wholly-owned corporate instrumentality then known as Lapinol, Inc. (now Lapinal, Inc.), one of petitioners herein, had sold hair dyes manufactured in accordance with the formula licensed to LaMaur, in violation of the exclusive license agreement (R. 52).

After hearing, the Minnesota court, Judge Gunnar H. Nordbye presiding, held that the license agreement had not been duly canceled (R. 87). It further found that the Lapins had in fact, and in violation of the exclusive license agreement with LaMaur, manufactured a hair dye containing "qualitatively" some or all of the same ingredients disclosed in the formulas licensed to LaMaur; and that, even if the combination of such ingredients in the product manufactured by the Lapins was different "quantitatively" from that disclosed in the formulas licensed to LaMaur, the formulas and processes used in the manufacture of Lapinol were an "improvement" thereof, covered by the license agreement (R. 72-3).

On December 30, 1950, in accordance with its findings, the Minnesota court entered a decree enjoining the Lapins for the duration of the license agreement, directly or through its corporate instrumentality, petitioner Lapinal, Inc. (then

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[1]The transcript of record consists of three volumes. In this brief, Volume 1 is cited as "R. ....." and Volumes 2 and 3 are cited as "R. Vol. ..... p. ....." except that the reporter's transcript of the proceedings had on November 20, 1962 in the District Court, included in Volume 3, is cited as "Rep. Tr." with the pagination of the original transcript. The Petition is cited as "Pet., p. ....." and the Appendices thereto as "Pet. App., p. ....."

known as Lapinol, Inc.), from manufacturing Lapinol (or Lapinal) in competition with LaMaur (R. 75, 88).

Negotiations for settlement ensued, which culminated in a stipulation dated July 2, 1951, under which the parties canceled the license agreement of November 22, 1947, and the Lapins, for a consideration of $2,500.00 and a release of all claims and demands of LaMaur for damages or other relief, save that reserved in the stipulation, sold to LaMaur the hair dye and the formulas and processes which were the subject-matter of the license agreement (R. 89, 91, 190, 191).

The stipulation provided that the Lapins would not disclose the formulas for the manufacture of "Lapinol" or "Lapinal" or authorize the manufacture thereof, with the proviso that this covenant should not be construed to prevent petitioner Albert Lapin, directly or through petitioner Lapinal, Inc., from manufacturing the same so long as Albert Lapin continued to be the principal officer of that corporation and the owner of a majority of each class of its shares or other securities (R. 92).

The stipulation provided that it "shall be binding upon and inure to the benefit of the heirs, executors, legal representatives, successors and assigns of the respective parties hereto" (R. 95).

On July 5, 1951, on application of LaMaur and in conformity with the stipulation, an amended decree of injunction was entered, enjoining the use or disclosure of the formulas and processes involved, subject to the proviso that the injunction would not extend to the manufacture of Lapinol or Lapinal by petitioners Albert Lapin or Lapinal, Inc., so long as Albert Lapin continued as the principal executive officer of the mentioned corporation and owned the majority of its issued shares or other securities (R. 96). The order and decree of July 5, 1951 in this respect is correctly set forth in the Petition (pp. 6-8).

On December 17, 1959, LaMaur tranferred the formulas and processes for the manufacture of Tecnique and all its right, title and interest in the Minnesota decree to Tecnique, Inc., a Minnesota corporation ("Tecnique of Minnesota") (R. 192, 196). The latter corporation, on the next day, December 18, 1959, transferred all the property and interests so acquired to respondent Tecnique, Inc., a New Jersey corporation ("Tecnique of New Jersey") (R. 194, 198), a wholly-owned subsidiary of respondent Shulton, Inc.

Tecnique of New Jersey had been organized by Shulton, Inc. on August 19, 1959 (R. 164) for the purpose of acquiring and continuing the business of Tecnique of Minnesota (R. 265-6). On that date, according to respondents' verified answers to petitioners' interrogatories (R. 165, 169), stock purchase agreements were executed for the sale of all the capital stock of Tecnique of Minnesota to Tecnique of New Jersey (R. 165). Other evidence, petitioners claim, supports the inference that the capital stock of Tecnique of Minnesota was transferred, not to Tecnique of New Jersey, but to respondent Shulton, Inc., so that on December 17 and 18, 1959, when Tecnique of Minnesota acquired the rights of LaMaur, Inc. in the Minnesota decree and re-assigned them to Tecnique of New Jersey, both the Minnesota and the New Jersey corporations were wholly-owned subsidiaries of Shulton, Inc. (Pet., pp. 24-28).

On July 7, 1962, petitioners filed a complaint in the United States District Court for the District of Southern California, alleging that both Shulton, Inc. and Tecnique of New Jersey maintained places of business in Los Angeles County (R. 2); that Tecnique of New Jersey is a wholly-owned subsidiary of Shulton, Inc. (R. 2); and that changed conditions since 1951 made the prospective application of the Minnesota decree inequitable (R. 7).

The action was brought under Rule 60(b) of the *Federal Rules of Civil Procedure* (R. 3) and prayed for judgment "dissolving the injunction issued on July 5, 1951 by the United States District Court for the District of Minnesota, Fourth Division, in Civil Action File No. 3232" (R. 7).

Service on Tecnique of New Jersey was sought to be made by service of a copy of the complaint on one Norton M. Breiseth, the Regional Manager of Shulton, Inc. in Los Angeles (R. 225).

On August 12, 1962, respondents filed a joint answer to the complaint which, among other things, recited the prior proceedings had in the Minnesota court and specifically "den[ied] that defendant Tecnique, Inc. maintains a place of business in the County of Los Angeles, State of California" (R. 8) or that "this action is maintainable in this Court under Rule 60(b) of the Federal Rules of Civil Procedure" (R. 8). The answer set forth as affirmative defenses that the action was maintainable only in the Minnesota court and that Tecnique of New Jersey was an indispensable party but did no business in the County of Los Angeles, State of California and was not duly served (R. 20-1).

On September 6, 1962, petitioners served on respondents 124 interrogatories (R. 100-23). Interrogatories 1-41 related to jurisdictional facts, such as the employment of personnel by Technique of New Jersey in California and its relations with Shulton, Inc. All of these interrogatories were answered on October 26, 1962, save and except a part of Interrogatory 26 (as to the price paid by Shulton, Inc. for certain shares of stock), which was objected to as immaterial (R. 159-69).

From the verified answers of respondents to petitioners' interrogatories 1 through 41, it appeared that Tecnique of New Jersey had no employees operating in California since September, 1959 (R. 159); that it maintained no stock of

merchandise in California (R. 160); and that Shulton, Inc. had not at any time since 1959 solicited any orders or otherwise conducted business in California on behalf of Tecnique of New Jersey (R. 160). It further appeared that Tecnique of New Jersey maintained books of account and bank accounts separate from those of Shulton, Inc. (R. 161), as well as a separate sales force and administrative staff (R. 161), although it occupied the same premises as defendant Shulton, Inc. in New Jersey, maintained no manufacturing or warehouse facilities separate from those of Shulton, Inc. (R. 161), and the majority of its Board of Directors and officers were also officers and directors of Shulton, Inc. (R. 162-3).

The remaining interrogatories, 42-124, related to the chemical formulas used in the manufacture of Tecnique; the chemical and competitive relation of Tecnique to other competing products manufactured by ten or more other concerns; the volume of defendants' business in the sale of Tecnique and the amounts expended for advertising the same; and requested particulars as to various defenses alleged in the answer. On October 15, 1962, all interrogatories 42-124 were objected to by respondents (R. 125-50), and the objections were set down for hearing on November 19, 1962.

On November 14, 1962, respondents moved to dismiss the complaint and noticed the motion for hearing on November 19, 1962 (R. 179). The grounds recited in the motion and supporting papers were that the service of process on Tecnique of New Jersey was invalid and that corporation was an indispensable party (R. 179-181), and that the action to dissolve the Minnesota decree was maintainable only in the

Minnesota court where the decree was originally issued (R. 201, 204).[2]

With respect to the second ground of the motion, counsel for petitioners stated that no motion for relief was made in the Minnesota court because "I have no desire to go back before Judge Nordbye, not the least. Judge Nordbye in his transcript (of the original trial) calls my man (petitioner Lapin) a... artist and their man (Mr. Pass, formerly of LaMaur, now president of Tecnique of New Jersey) a genius" (Rep. Tr., p. 70), and because petitioners allegedly could not afford the expense of a proceeding in the Minnesota court (Rep. Tr., p. 72).

On December 4, 1962, after argument, the District Court entered its order granting respondents' motion to dismiss (R. 225) upon the ground that Tecnique was the apparent owner of the decree of injunction sought to be dissolved and therefore an indispensable party and had not been duly served (R. 226-7). The court added that, while the foregoing was determinative of the matter, the court was "of the opinion that the relief sought by the plaintiff should only be sought by motion in the District Court where the original decree was issued" (R. 227).

On December 12, 1962, petitioners moved to amend and modify the judgment pursuant to Rule 59 *F.R.C.P.* and prayed for an order as follows (R. 234, 237):

1. For a re-hearing so as to permit petitioners to make a matter of record the documents referred to in argument of petitioners' counsel (R. 234).

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[2]Although the second ground was inadvertently omitted from the motion itself, it was set forth in the accompanying "Statement of Reasons in Support of This Motion" (R. 180-1) and petitioners consented to argue and did argue this ground of the motion, on the condition, which the District Court granted, that they be permitted to file their memorandum after the hearing. (Rep. Tr. 2, pp. 11-13, 50-1).

2. To grant petitioners leave to take additional evidence by deposition or affidavit on the issues of jurisdiction raised by the motion to dismiss (R. 234, 257).

3. To grant petitioners a plenary trial on the jurisdictional issues on the ground that they overlapped in material part the substantive issues of fact involved in the merits (R. 234, 261).

4. To modify the judgment so as to provide that the same would be "without prejudice" (R. 234, 257).

On April 29, 1963, the District Court overruled the motion for re-hearing, excepting that it permitted the record to show that the documents referred to by petitioners' counsel at the argument on the motion to dismiss were formally made a part of the record, and modified the judgment so as to provide that the same was "without prejudice to the bringing of another action when and if it appears that the court can obtain jurisdiction of the defendant Tecnique, Inc." (R. 273, 278).

The District Court stated that in its original order of December 4, 1962, it had "made no finding that Tecnique of New Jersey is in legal effect the owner of the decree of injunction," but that "the purport of that Order is that, because of its *apparent* ownership, Tecnique of New Jersey is an indispensable party to any action which seeks to extinguish such injunction and consequently the rights therein" (R. 276). The court added that, "Being of the opinion that the present action is properly maintainable only in the District Court where the decree of injunction was rendered * * *, I cannot feel that failure to treat Tecnique as a sham at this time leads to an inequitable result" (R. 277).

In affirming the dismissal, the court below found it unnecessary to consider whether Tecnique of New Jersey was an indispensable party and had not been properly served. The

court below held, however, that so long as it is "apparent that a remedy is available" in the issuing court, another court should decline jurisdiction "in such a case as this" (Pet. App. p. 7). The grounds of its decision are fully discussed in the Argument.

ARGUMENT

The decision below presents no question warranting review by this Court. Petitioners' argument to the contrary misconceives both the plain purpose of the 1946 amendments to Rule 60(b) and the grounds of the decision below.

As originally worded, Rule 60(b) authorized relief from a judgment by "motion" in the rendering court only on the grounds of "mistake, inadvertence, surprise, or excusable neglect," but contained a clause saving to the courts the power to grant relief in an "action," a term which was usually construed to include, not only an "independent action," but also proceedings under the old ancillary writs and bills of review which afforded relief on other grounds in the rendering court. 7 Moore's *Federal Practice* (2d Ed.), sec. 60.16(2), pp. 74-5. The substantive grounds for relief under the old ancillary remedies, however, were "shrouded in ancient lore and mystery," and the procedural practice for obtaining the relief which they afforded was left undefined. *Id.*, sec. 60.18(5), pp. 206-9 (Advisory Committee Report). These defects were removed by the 1946 amendments to the Rule.

Rule 60(b) as amended sets forth five specific grounds, and a sixth general one, for relief from a judgment by "motion" in the court in which the judgment was entered. One of these is that "(5) * * * it is no longer equitable that the judgment should have prospective application." It is this provision, significantly, on which, so petitioners assert, the present action was based (Pet. pp. 3, 9, 17).

Rule 60(b) adds a saving clause stating that "This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, * * *." The amended Rule concludes with a provision abolishing the old writs and bills of review and specifying that the "procedure" for obtaining "any relief from a judgment" shall be "by motion as prescribed in these rules or by an independent action," without restating the substantive bases "prescribed" for a "motion" or stating any ground for an "independent action."

The amended Rule 60(b) thus made "no attempt" to "state the substantive bases for such an (independent) action," and "These are determined by past judicial decision and future evolution, through the judicial process, of equitable remedies." *Id.*, sec. 60.37(1), pp. 606-7.

The question presented is thus, not whether Rule 60(b) purports to authorize an independent action on the same substantive grounds as those "prescribed in these rules" for a "motion" in the rendering court, as petitioners seem to claim—plainly it does not—but whether "under established equitable principles," as judicially determined (*id.*, sec. 60.37(2), p. 625), a non-rendering court may or should exercise jurisdiction on the grounds here alleged, where an adequate remedy is available in the issuing court.

The court below held that, in the light of past precedent and a "sound policy" not to "interfere" with the "inherent power of the issuing court" to "supervise its continuing decree", the interests of "comity and orderly administration of justice" demand that another court should "decline jurisdiction" in "such a case as this," so long as "it is apparent that a remedy is available" in the issuing court (Pet. App. pp. 5-7). The court below did "not" hold that other courts lack "all jurisdiction" of an independent action based on such grounds, much less of one based on any other ground for relief not

touching the continuing supervision of the issuing court (Pet. App. p. 7).

The decision below is thus a narrow one, and presents no question of importance. Petitioners' claim that the "reasoning" of the court below unduly restricts the scope of relief "in every case" in the federal courts (Pet. p. 11) misconceives the effect of Rule 60(b) and the ruling below. See *infra*, p. 14. Petitioners proceed on the same misconception in asserting (Pet. pp. 14-17) that the decision below conflicts with that of this Court in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944), upholding the power of a United States Court of Appeals to vacate its own judgment rendered at a prior term of court "upon proof that fraud was perpetrated upon it" (322 U.S. at 239), and with the decisions in other circuits in *Hadden v. Rumsey Products*, 196 F.2d 92 (C.A. 2, 1952), and *Sayers v. Burkhardt*, 85 Fed. 246 (C.A. 4, 1898), sustaining the power of a non-rendering court to enjoin enforcement of a judgment in an independent action because of other types of "fraud." See *infra*, pp. 19-20. Petitioners' claim that an adequate remedy is not available in the Minnesota court on the special "facts of this case" (Pet. p. 17) presents no question of importance, and ignores settled principle: the ancillary jurisdiction of the Minnesota court would support service of process on Tecnique of New Jersey, as assignee of all rights under the Minnesota decree, and the parent corporation, Shulton, Inc., would not be a necessary party. See *infra*, p. 22.

Finally, petitioners' claim that the District Court erred in finding that Tecnique of New Jersey was an indispensable party in the California action and had not been duly served there (Pet. pp. 21-35), was not passed upon by the court below, turns on the special facts of this case, and presents no question of importance. The District Court's decision, moreover, was correct. See *infra*, p. 23.

1. No question of importance is presented. The decision below is limited to the facts of this case. It holds only that where there is an adequate remedy by motion in the issuing court to dissolve an injunction because of changed conditions which render its prospective application inequitable, the non-rendering court should decline jurisdiction of an independent action to grant relief on such grounds, in the interest of "comity and orderly administration of justice" (Pet. App. p. 7).

There is no warrant for petitioners' claim that the "reasoning" of the court below presents a broader question affecting "every action" in the federal courts (Pet. p. 11). The argument that the court below has "rigorously restricted" the purpose of amended Rule 60(b) (Pet. p. 11) misconceives the purpose of that Rule (see *supra*, pp. 11-12) and the nature of the ruling below. The court below expressly recognized that relief in an independent action in a non-rendering court operates "only upon the parties and not on the decree itself" (Pet. App. p. 6); refrained from holding that the non-rendering court lacked all jurisdiction to dissolve an injunction even on the ground of changed conditions, in the absence of an adequate remedy available in the issuing court; and placed no limitation on the power of any court to entertain an independent action on any other ground not touching the power of the issuing court to supervise its continuing decrees (*Cf. Johnson v. St. Louis, I. M. & S. R. Co.*, 141 U.S. 602 (1891) (money judgment satisfied after entry); *United States v. Throckmorton*, 98 U.S. 61 (1878) (extrinsic fraud); 7 Moore's *Federal Practice* (2nd Ed.), sec. 60.36, pp. 602-4), though there is eminent authority that the non-rendering court "in the exercise of a sound discretion could refuse to proceed" even in such cases, where the remedy in the issuing court is plain, adequate, and complete. *Id.*, sec. 60.37(2), p. 624.

Petitioners' further argument in support of the same claim, that the "reasoning" of the court below improperly

"infused into the clear language of the rule the subtleties and confusions of the old common law writs and equitable remedies" (Pet., p. 11), exceeds the bounds of fair comment. The court below, while stating that the saving clause of Rule 60(b) "does not purport to grant new power and authority not theretofore recognized," also stated that it preserved the powers which the courts had theretofore been free to exercise under the specified writs "or otherwise" (Pet. App., p. 4). Petitioners simply omit the words "or otherwise" in attempting to assign a reason for granting the writ (Pet., p. 11). The court below found no precedent in the former writs or bills of review for an independent action in another court such as this one (Pet. App., pp. 4-5), as petitioners assert (Pet., p. 12). But, as petitioners again omit to mention, the court below also relied on past precedent specifically denying such relief in an independent action (in *Deposit Bank v. Frankfort*, 191 U.S. 499, 512 (1903)), and stressed the "sound reasons of policy" announced in *System Federation No. 91, Railway Employees' Dep't. v. Wright*, 364 U.S. 642, 647 (1961), in concluding that, for a non-rendering court to entertain an action such as this, would "be seriously to interfere with, and substantially to usurp, the inherent power of the issuing court * * * to supervise its continuing decree" (Pet. App., pp. 3, 5-7).

Petitioners then contrast their distorted version of the opinion below with a misleading excerpt from the Report of The Advisory Committee recommending the amendments made to Rule 60(b) in 1946 to show a need for corrective action by this Court. But even the limited portion of that Report quoted by petitioners states that the Committee endeavored only to permit "the granting of various kinds of relief which were permitted in the Federal Courts prior to the adoption of these rules" (See Pet., pp. 13-14), a statement which accords with the conclusion of the court below.

The same portion of the Report also states that the amendments abolished the old ancillary writs and equitable remedies and required the "practice to be by motion or by independent action (See Pet., p. 14). But nothing in it forbids reference to the former remedies "as an aid to an intelligent understanding" of the "aims" of the amended Rule (7 Moore's *Federal Practice* (2d Ed.), sec. 60.34, p. 515). And the full text of the Report makes clear, moreover, that, while the amendments substantially revised the grounds for a "motion" in the rendering court, they made no change whatever in the basis for an "independent action" in any court. *Id.*, sec. 60.18(5), pp. 206-9.

It need only be added that on the narrow issue actually decided by the court below, the decision accords with precedent and settled practice and principles long established by this Court, both in its result and its reasoning, and presents no novel question calling for review by this Court.

Courts of equity have always possessed an "inherent" jurisdiction to modify or set aside a decree of injunction because of changed circumstances occurring after the term in which the decree was entered, as the court below pointed out (Pet. App., pp. 2-3) and petitioners neglect to mention. *United States v. Swift & Co.*, 286 U.S. 106, 114-15 (1932); *State of Pennsylvania v. The Wheeling & Belmont Bridge Co.*, 18 How. (U.S.) 421 (1856). Resort to the "inherent" jurisdiction of the issuing court in such cases has in fact always provided an adequate remedy. So far as we are aware, there have been no reported cases prior to this one since the adoption of the Federal Rules of Civil Procedure in which relief from prospective operation of a decree of injunction because of changed circumstances has ever been sought in any court other than the issuing court, and only one in which relief was sought in such an action on that ground before the promulgation of the Rules, and in that case, as petitioners neg-

lect to mention, relief was denied and the claimant was required to resort to his remedy in the issuing court. *Deposit Bank v. Frankfort*, 191 U.S. 499, 512 (1903); *Cf. Torquay Corp. v. Radio Corp. of America*, 2 F. Supp. 841, 844 (S.D. N.Y., 1932). The former bill of review, abolished by the 1946 amendments to Rule 60(b), was required to be filed in the issuing court, as the court below pointed out (Pet. App., p. 5), and, so petitioners insist, afforded no relief in cases such as this one (Pet., p. 19).

As the court below concluded, moreover, and petitioners again omit to mention, "sound reasons of policy support the proposition that relief should be sought from the issuing court" (Pet. App., p. 6), in accordance with established practice. The "source of the power to modify" a decree of injunction, as this Court held in *System Federation No. 91, Railway Employees Dep't. v. Wright*, 364 U.S. 642, 647 (1961), "is, of course, the fact that an injunction often requires continuing supervision by the issuing court and always a continuing willingness to apply its powers and processes on behalf of the party who obtained that equitable relief." It was this reason which led the court below to conclude, quite properly, that "for a non-issuing court to entertain an action for such relief would be seriously to interfere with, and substantially to usurp, the inherent power of the issuing court * * * to supervise its continuing decree by determining from time to time whether and how the decree should be supplemented, modified or discontinued, in order properly to adapt it to new or changing circumstances" (Pet. App., pp. 6-7).

To entertain such an action, moreover, would be to invite the losing party to shop around for a more favorable forum to re-litigate, in substance, if not in terms, the issues determined in the original action, and to obtain a more favorable decree. In the District Court, counsel for petitioners quite frankly stated that one reason he had not moved for ancillary

relief in the issuing court was that "I have no desire to go back before Judge Nordbye, not the least. Judge Nordbye in his transcript (of the original trial) calls my man (petitioner Lapin) an artist and their man (Mr. Pass, formerly of La-Maur and now president of Tecnique of New Jersey) a genius" (Rep. Tr. 70).

Nothing in the clear language of Rule 60(b) requires or permits what precedent and policy forbid. In so holding, the court below merely gave effect to the plain language of the Rule and to settled principles. Rule 60(b)(5) unequivocally provides that on "motion" and on such terms as are just, the "court" may relieve a party "from a final judgment" because "it is no longer equitable that the judgment should have prospective application." It is under this provision, according to petitioners, that the present proceeding was brought (Pet., pp. 3, 9, 17). But beyond dispute the "court" referred to in Rule 60(b)(5) is the one "in which the judgment was rendered" and, where the judgment is registered in another district pursuant to Title 28, *U.S.C.*, sec. 1963, possibly in that court, as well. See 7 Moore's *Federal Practice* (2d Ed.), sec. 60.28, pp. 312-16.

The claim, implicit throughout the petition, and made expressly by petitioners in the District Court, that "Rule 60 (b)" also gives a litigant "a right to bring an independent action to get relief from the prospective effects of an injunction" (Rep. Tr., p. 52) simply ignores the clear language of the Rule and its generally accepted construction.

Rule 60(b), as the court below recognized (Pet. App., pp. 3-4), contains an express saving clause stating that "This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment". But the saving clause, unlike the preceding provisions specifying the grounds of a "motion" in the rendering court, makes "no attempt * * * to state the substantive bases for such an

[independent] action," which must thus be "determined" by "past judicial decision" and, in the view most favorable to petitioners, "future evolution, through the judicial process, of equitable principles." 7 Moore's *Federal Practice* (2d Ed.), sec. 60.37(1), pp. 606-7. And past precedent *(Deposit Bank v. Frankfort, supra; Cf. Torquay Corp. v. Radio Corp. of America, supra)* and sound considerations of policy clearly expressed in *System Federation No. 91, Railway Employees Dep't. v. Wright, supra*, as the court below correctly reasoned, both demand that the non-rendering court decline to exercise jurisdiction in a case such as this, where an adequate remedy is available in the issuing court. See 7 Moore's *Federal Practice* (2d Ed.), sec. 60.37(2), p. 624.

2. The decision below is not in conflict with that of this Court in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944), on which petitioners rely (Pet., pp. 16-17). In that case, this Court held that a United States Court of Appeals, "upon proof that fraud was perpetrated upon it by a successful litigant" (322 U.S. at 239), had power to vacate its judgment rendered at a prior term of court and to direct the vacation of the District Court decree entered pursuant to the mandate of the appellate court. The judgment set aside in that case, to be sure, was a decree of injunction but the ground for the relief granted was not that its prospective operation would be inequitable because of changed circumstances occurring after the entry of the decree, but because of fraud on the court in procuring the judgment. No action in another court was involved and the express reservation in the saving clause of Rule 60(b), as later amended in 1946, of power "to set aside a judgment for fraud upon the court" must be exercised in the court in which the fraud was practiced. 7 Moore's *Federal Practice* (2d Ed.), sec. 60.33, p. 305.

It was in this context that the Court, in a portion of its opinion quoted by petitioners (Pet., pp. 16-17), reviewed the precedents denying finality to judgments where enforcement would be "manifestly unconscionable" and referred to alternative remedies affording such relief, including both ancillary proceedings in the issuing court and "original proceedings to enjoin enforcement of the judgment" (322 U.S. at 244-5). But in other language contained in the same portion of its opinion, omitted by petitioners, the Court also pointed out that these remedies were evolved because of a "need for correcting injustices which, in certain instances, are deemed sufficiently gross to demand a departure from rigid adherence to the term rule" (322 U.S. at 244), a rule which formerly limited the jurisdiction of the rendering court to set aside a judgment after the term in which it was entered, but which never limited the "inherent" jurisdiction of the issuing court to dissolve a decree of injunction because of changed conditions rendering its prospective enforcement inequitable.

3. There is no conflict between the decision below and that of the United States Court of Appeals for the Second Circuit in *Hadden v. Rumsey Products*, 196 F.2d 92 (C.A. 2, 1952), or that of the United States Court of Appeals for the Fourth Circuit in *Sayers v. Burkhardt*, 85 F. 246 (C.A. 4, 1898), on which petitioners rely (Pet., pp. 14-16).

In the *Hadden* case, judgment had been taken by confession in a federal district court in Ohio on *cognovit* notes, and the judgment was thereafter registered in a federal district court in New York pursuant to Title 28, *U.S.C.*, sec. 1963. The judgment creditor moved in the New York court for an order setting aside the judgment, alleging "duress, fraudulent misrepresentation, and concealment" and failure of the plaintiff's attorney to inform the Ohio court that the

defendant had asserted defenses to the notes. The Court of Appeals found it unnecessary to consider whether Rule 60 (b) permitted a motion in the court in which the judgment was registered, as well as in the court in which the judgment was entered (196 F.2d at 95). It held that under the saving clause of Rule 60(b) the New York court had power to grant relief in an independent action, and that although the entry of the judgment by the plaintiffs in conformity with the terms of the *cognovit* notes was not "a fraud on the court," a court of equity could grant relief in an independent action because of the allegations of "fraud in procuring the execution of the notes" consenting to the confession of judgment (196 F.2d at 96).

The court, to be sure, treated the motion as an independent action, but in so doing it nowhere held or even intimated that the grounds for relief by motion were the same as those for relief in an independent action. The court upheld the right to relief in an independent action, without referring to any grounds stated in Rule 60(b) for relief by motion and solely on the basis of precedents authorizing relief in an independent action (196 F.2d at 96, n. 10).

Where the requisites of valid service and federal jurisdiction are both present, the procedural distinction between a motion and an "independent action" may be disregarded as largely a matter of "nomenclature," and a pleading denominated as a "motion" may be treated as an "independent action," but only if the substantive grounds alleged for relief warrant "an independent action" on "established equitable principles." 7 Moore's *Federal Practice* (2d Ed.), secs. 60.37(2), 60.38(3), pp. 623-4, 642. In some cases, the grounds specified for a motion in Rule 60(b)(1)-(6) may be the same as those for an independent action under "established equitable principles," as where "accident, mistake, newly discovered evidence" or some types of "fraud" is alleged. *Id.*,

sec. 60.37(2), p. 625. But they are not alway so (*id.*, sec. 60.33, p. 509), and certainly are not, where, as here, the ground for relief alleged is that changed conditions render the prospective application of the judgment inequitable. See *supra*, p. 18. Nothing in the *Hadden* case conflicts with these principles in any way.

In the *Sayers* case, the court merely held an independent action would lie to set aside a judgment obtained by "fraud" (85 F. at 248). The judgment set aside, to be sure, was a decree in equity, but one forfeiting title to certain lands, apparently for alleged delinquency in payment of taxes, and the ground for setting aside the decree was not that its prospective application would be inequitable because of changed circumstances, but "fraud" in obtaining the judgment.

4. Petitioners' claim (Pet., pp. 17-21) that under the special "facts of this case" adequate relief is not available in the Minnesota court ignores settled principle and presents no question of general importance warranting review by this Court.

Proceedings for relief from a judgment by motion in the rendering court are ancillary in nature (*Milw. and Minn. R. Co. v. Soutter*, 2 Wall. (U.S.) 609, 633 (1865); *Pacific Railroad v. Missouri Pacific Railway*, 3 F. 772 (C.C.E.D. Mo., 1880, per Justice Miller)), and by order of that court all parties to the original proceeding or those in privity with them, including non-residents, may be served beyond the territorial limits of the court. 7 Moore's *Federal Practice* (2d Ed.), sec. 60.38(2), pp. 640-1. Such service in this case could thus be made by the Minnesota court on Tecnique of New Jersey, as assignee of the rights of LaMaur, Inc., under the Minnesota decree, if not on the parent corporation, Shulton, Inc. (*Butler v. Ungerleider*, 187 F.2d 238, 239 (C.A. 2, 1951)), and, though the parent corporation is not qualified to do

business in Minnesota (R. 164), it would not be a necessary party in any such proceeding. 9 Fletcher *Cyclopedia of Corporation* (Perm. Ed.), sec. 4473, p. 307. Although essentially the same arguments were set forth in respondents' brief in the court below, petitioners made no argument to the contrary in the brief which they filed in that court, and filed no reply brief or petition for re-hearing below. The court below, therefore, had no occasion to discuss this issue in its opinion, and did not do so.

In this Court, moreover, petitioners at most claim that it is "at least doubtful whether or not such a theory of ancillary jurisdiction could be sustained" (Pet., p. 18), without anywhere indicating the basis for such a doubt. Petitioners further claim that "Shulton was and is, in our view, the principal defendant and the two Tecnique corporations were and are mere instrumentalities" (Pet., p. 18), but nowhere assert that Shulton would be a necessary party to an ancillary proceeding against Tecnique of New Jersey on motion in the Minnesota court.[3]

Petitioners' statement that the former common law writs and bills of review would not provide a theory for relief (Pet., p. 19) is wholly beside the mark. The issuing court in Minnesota has "inherent" power, now expressly embodied in Rule 60(b)(5), to grant relief on the grounds alleged, as the court below pointed out (Pet. App., pp. 1, n. 1, 2-3).

5. The court below found it unnecessary to pass upon the decision of the District Court that Tecnique of New Jersey was an indispensable party and was not duly served by service on the parent corporation, Shulton, Inc. On the facts

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[3]It may be added that if, as petitioners claim, Tecnique of New Jersey is the mere alter ego of the parent corporation, the conclusion would follow, not that Tecnique of New Jersey is beyond the reach of process issuing from the Minnesota court, but that the claimed corporate fiction could be disregarded, so as to permit service on the parent corporation by service on its subsidiary.

of this case, the decision of the District Court was plainly correct, moreover, and contrary to petitioners' contentions (Pet., pp. 21-35) presents no question of general importance warranting review by this Court.

The controlling principles are not in dispute. Tecnique of New Jersey, as the apparent owner of record of all rights under the Minnesota decree, was an indispensable party to an action in which its rights thereunder might be adversely affected (3 Moore's *Federal Practice* (2d Ed.), sec. 19.12, pp. 2171-2), and this notwithstanding that it was subject both to the "potential control" of the parent through "ownership of stock" and to the "actual control" of the parent by reason of members of the "boards of directors" and "executive officers" shared in common by the two corporations. *Niles-Bement-Pond Co. v. Iron Molders' Union*, 254 U.S. 77, 80-2 (1920). Tecnique of New Jersey, moreover, was not amenable to suit or service in the California court. It did no business in California (R. 160) and the attempted service on it by service on the parent corporation was ineffective, as the District Court held (Pet. App., pp. 9-10). The two corporations maintained separate corporate and financial records (R. 161), and the separate identity of the subsidiary could not be disregarded, though the parent corporation "dominates" the subsidiary "immediately and completely" and "exerts its control, both commercially and financially * * * through the same individuals" and the subsidiary has no separate manufacturing or other facilities. *Cannon Manufacturing Co. v. Cudahy Packing Co.*, 267 U.S. 333, 335 (1925); *Harris v. Deere & Co.*, 128 F. Supp. 799 (E.D. N.C., 1955), aff'd. 223 F.2d 161 (C.A. 4, 1955); *A. P. Bliss Co. v. United Carr-Fastener Co.*, 116 F. Supp. 291 (D.C., Mass., 1953), aff'd. 213 F.2d 541 (C.A. 1, 1954).

The jurisdictional facts, to be sure, were resolved by the District Court on affidavits (and the documentary evidence

relied on in the Petition, pp. 22-31) and correctly so in the circumstances of this case. Again, there is no dispute as to the controlling principles. Petitioners concede that, in general, jurisdictional facts on motion to dismiss for want of valid service may be resolved on affidavits (Pet., p. 33). And respondents have no quarrel with petitioners' claim that a plenary trial is required where the jurisdictional and substantive issues overlap and that, even in the determination of the jurisdictional issues alone, adequate opportunity should normally be afforded for pre-trial discovery in the exercise of a sound discretion (Pet., pp. 33-4).

The District Court, however, correctly found that the jurisdictional and substantive issues were separate and distinct in this case (Pet. App., pp. 15-16). The formal separation of the parent and subsidiary corporations, on which the jurisdictional issue turned, while real for purposes of service of process and joinder of parties (*Cannon Manufacturing Co. v. Cudahy Packing Co., supra; Niles-Bement-Pond Co. v. Iron Molders' Union, supra*), would afford no bar whatever to relief from the Minnesota decree on the merits if, as alleged, its prospective operation would be inequitable. *Cf. Anderson v. Abbott*, 321 U.S. 349, 361-3 (1944); *United States v. Yellow Cab Co.*, 332 U.S. 218, 227 (1947).

The claim that petitioners should have been allowed further discovery on the jurisdictional issues before the motion to dismiss was granted is equally without merit. No showing of any need for such discovery was made by petitioners before the District Court originally acted on the motion to

dismiss.[4] On petition for re-hearing under Rule 59, petitioners for the first time (cf. Rep. Tr., pp. 40-50, 67-72; with R. 236-241) filed an affidavit of their counsel claiming that in certain specifically designated instances Shulton, Inc. had in fact acted as the agent of Tecnique of New Jersey in doing business in California (Pet. App., pp. 12-17; R. 240-1), a claim which was controverted by a responsive affidavit of respondents (R. 270-1). But again petitioners gave no reason for their failure to make such claims before the motion to dismiss was decided, and the court below denied the motion for new trial without discussing the question whether further discovery was warranted (Pet. App., pp. 12-17). Cf. 6 *Moore's Federal Practice* (2d Ed.), sec. 59.04(13), p. 3727.

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[4]Prior to the argument on the motion to dismiss, respondents had answered all of the interrogatories served by petitioners relating to the jurisdictional issues (R. 159); a notice to take the deposition of one of respondents' counsel was withdrawn (R. Vol. 2). At the argument the only issues mentioned by petitioners' counsel as requiring further pre-trial discovery were (1) whether, at the time of the assignment of the Minnesota decree by Tecnique of Minnesota to Tecnique of New Jersey, both corporations were, as petitioners claimed, wholly-owned subsidiaries of Shulton, Inc., a claim which, although controverted by one of respondents' affidavits, was conceded by respondents' counsel at the argument (Rep. Tr., pp. 64-5), and was immaterial in any case—the claim that intercorporate transfers between two wholly-owned subsidiaries are "without genuine substance or significance" (Pet., p. 22) hardly rises to the dignity of an argument; (2) whether the parent corporation "financed" Tecnique of New Jersey (Rep. Tr., p. 47), which was immaterial, if true (*Cannon Manufacturing Co. v. Cudahy Packing Co., supra*), and (3) whether Shulton, Inc. was an "agent" of Tecnique of New Jersey in California (Rep. Tr., p. 47), though petitioners could have demanded a hearing on oral evidence on this issue under Rule 43(e), *F.R.C.P.* and subpoenaed the resident agents of Shulton, Inc. to appear at the hearing, which petitioners neglected to do. Thereafter, in their memorandum in opposition to the motion, petitioners, while claiming that respondents had opposed any discovery, asserted that "there are sufficient facts in the papers filed in this proceeding and in the public records" to support their position that Tecnique of New Jersey was the alter ego of Shulton, Inc. (R. 214), and neither made any claim therein that decision should be deferred until such discovery was had or cited any authorities to support such a claim. The District Court quite properly, therefore, granted the motion to dismiss without referring in any way to petitioners' claim that further discovery should have been allowed (Pet. App., pp. 9-11).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari should be denied.

Respectfully submitted,

LEONARD, STREET AND DEINARD
By: MELVIN H. SIEGEL
818 Farmers and Mechanics Bank Bldg.
Minneapolis, Minnesota 55402
Attorneys for Respondents

Dated: This 16th day of September, 1964.